for The Defense

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The Training Newsletter for the Maricopa County Public Defender's Office ~ Dean Trebesch, Maricopa County Public Defender

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Closing Argument: You Can't Teach a Dead Dogma New Tricks

by Lawrence S. Matthew,
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"I asked him if he was a cop. I asked him three times, and each time he said 'no.' That means I was entrapped."

--A "Streetwise" Defendant

Most criminal defense attorneys have been on the receiving end of a statement similar to the one above. Isn't it funny how some myths just refuse to die? This article, however, isn't about the mythology surrounding the entrapment defense. Rather, it's about the unexplainable longevity of another myth which goes something like this: *Try to avoid objecting during closing argument--this will put pressure on the prosecutor not to object during your closing argument and, if your opponent does object, the jury will resent it.*

What baloney!! Perhaps this rule was somewhat valid during the prim and proper Victorian or Edwardian eras, but no longer. Unfortunately, trials today are more akin to a boxing match where the accused and defense counsel stand inside the ring wearing gloves while the prosecutor stands outside the ring throwing tables and chairs.

Who in their right mind actually believes that a prosecutor will feel even the slightest reluctance to object during your closing if you refrain from objecting? Moreover, do you really think the jurors will resent the prosecutor if your closing is interrupted by objections? Perhaps they will feel some resentment--but only because the objections will delay the moment when they may finally retire to convict your client.

All levity aside, the reasons for making objections during closing arguments should not be ignored out of deference to dogma.

First and foremost, an objection is generally necessary to avoid waiver.[1] Second, an appropriate objection coupled with a ruling in your favor may lessen the effectiveness of the prosecutor's argument. Third, an appropriate objection may throw your opponent "off stride" thus disrupting the flow and impact of his or her argument.

On the other hand, your objection may focus the jury's attention on that part of the prosecutor's argument

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to which you take exception and, if the court overrules your objection, the jury may give the prosecutor's argument undue credence.

The point being made here is that the decision of whether or not to object during closing argument should never be based on some longstanding dogma. Rather, the decision to object during closing argument should be made on the basis of the same type of considerations that govern the making of objections at any other time during trial.

Rarely do these transgressions merit a strategy of muteness on the part of defense counsel.

The remainder of this article discusses transgressions commonly made by prosecutors during closing argument. Many occur without an objection by defense counsel. Rarely do these transgressions merit a strategy of muteness on the part of defense counsel. Thus, it can only be concluded that too much stock is being placed in the I-won't-object-if-you-won't-object school of closing argument.

How Far Is Too Far?

What is permitted and what is forbidden during closing argument? Counsel is given wide latitude and may comment on and argue all reasonable inferences arising from the evidence presented.[2] Counsel is given considerable latitude during closing "because closing arguments are not evidentiary in nature."[3] The latitude, however, is not unlimited.

(i) Vouching.

Neither side may "vouch" for witnesses. Vouching is especially problematic in cases where the credibility of a witness is crucial to the outcome. Prosecutorial vouching occurs when the prosecutor does either of two things. First, it will occur when the prestige of the government is used to bolster a witness's credibility.[4] Second, it occurs when the prosecutor suggests that information not presented to the jury supports the witness's testimony.[5] Prosecutors are under a special obligation to avoid improper suggestions and, in particular, assertions of personal knowledge.[6]

(ii) The right to remain silent.

Prosecutors are prohibited from commenting on either the post-arrest silence of an accused or an accused's failure to testify. As to the former, the United States Supreme Court has ruled that an accused's post-*Miranda* invocation of the right to remain silent may not be used against him.[7] A prosecutor is permitted, however, to comment on pre-*Miranda* silence, occurring before or after arrest, because such silence is not induced by governmental action.[8]

With regard to the latter, the high court has ruled that the Fifth Amendment's prohibition against self-incrimination prevents a prosecutor from directly or indirectly drawing the jury's attention to an accused's decision not to testify at trial.[9] Such a comment, however, must be adverse in that it supports an unfavorable inference against the accused, and operates as a penalty for exercising the right to refrain from giving testimony.[10]

(iii) Injecting personal opinion.

A prosecutor may not offer personal opinion as to an accused's guilt or innocence;[11] nor may personal opinion be offered as to the credibility of the testimony of witnesses[12] or the accused.[13] Comments on credibility are permitted, however, when they are based on facts in the evidence as opposed to being mere personal opinion.[14]

(iv) Appeals to sympathy, fear, or passion and prejudice.

Emotional language is to be expected during closing argument. The Arizona Supreme Court has stated that in closing argument, "excessive and emotional language is the bread and butter weapon of counsel's forensic arsenal . . . ."[15] Notwithstanding this apparent license to harangue, a prosecutor exceeds the bounds of proper advocacy when his or her remarks "inflame the minds of the jurors with passion or prejudice . . . ."[16]

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While prosecutors may comment on the vicious or inhumane nature of the alleged acts of the accused, "name-calling" is an appeal to passion and prejudice. It has been held to be error to refer to the accused as a "monster," as "filth," as "the reincarnation of the devil,"[17] or as a "psychopath."[18] Similarly, a prosecutor's implied comparison of the accused with "Sicilianos" was an appeal to passion and prejudice in that it linked the defendant to the "Mafia."[19]

Any argument that the jury should base its verdict on considerations relating to the plight of the victim or the victim's family is improper.[20] Similarly, tugging at heartstrings by making repeated references to such things as Christmastime, pregnant women, and employee layoffs is improper.[21]

Arguments referring to the prevalence of crime, the efforts of police in combatting crime, and the duty of the jury are permitted.[22] Reversible error was found, however, when a prosecutor argued that the accused should be convicted because "you can either back [the police] up when they're out there at night risking their lives for you and your family or you can turn your back on them."[23]

Unfortunately, trials today are more akin to a boxing match where the accused and defense counsel stand inside the ring wearing gloves while the prosecutor stands outside the ring throwing tables and chairs.

As to the jury's duty, it is not the "duty" of the jury to send "messages." Rather, "the only proper consideration of the jury [is] the guilt or innocence of [the] defendant."[24]

(v) Gilding the lily.

On occasion, prosecutors will seek an edge by implying that the court approves of or agrees with the state's case. Reversals have resulted from arguments such as "[h]ad this been a weak case, the court would have directed us out,"[25] or "if I did anything wrong in this trial I wouldn't be here[;] the court wouldn't allow that to happen."[26]

In cases involving lesser-included offenses, prosecutors sometimes try to undercut the accused by improperly informing the jury that the lesser offense instructions were requested by the defense. By doing so, the prosecutor is attempting to have defense counsel appear duplicitous. The state also hopes that the jury will treat the request for the lesser offense as an admission of guilt.[27]

Head 'em off at the pass.

As public defenders, we have the benefit, from past experiences, of knowing our opponents well. If the prosecutor has a history of pushing the limits during closing argument, consider requesting that the judge direct the prosecutor to stay away from expected abuses. Hopefully, this will curb the prosecutor's zeal to test the limits. If it doesn't, you have a much stronger argument for willful misconduct and there exists a greater likelihood that your objections will be immediately sustained.

When to Object.

Over 40 years ago, the Arizona Supreme Court stated:

"[I]t is the universal rule that if improper statements are made by counsel during the trial it is the duty of opposing counsel to register an objection thereto so that the court may make a correction by proper instruction and, if the offense be sufficiently hurtful, declare a mistrial."[28]

While there is authority stating that objections are timely if made at the completion of final argument,[29] there is also case law which holds that failure to object at the earliest possible opportunity results in waiver.[30]

To avoid having an objection overruled in front of the jury--the occurrence of which may be perceived by the jury as a rebuke against you personally--you might first ask to approach the bench. If the court refuses, then immediately state your objection.

The general remedy for improper comments by prosecutors during closing argument is the granting of a motion to strike followed by an instruction that the matter is irrelevant and should be disregarded.[31] If the prosecutor continues to make improper arguments, counsel should request that the judge admonish the prosecutor in the presence of the jury. When necessary, counsel should request a mistrial.

Since closing argument is the point in a trial when a prosecutor's emotions are bound to lead him or her astray, improper arguments should always be expected. Don't be "Mr. Nice Guy" by saving objections out of deference to outdated dogma. Don't give an inch during closing argument. **OBJECT!**

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1. Failure to object to comments made during closing argument constitutes waiver of the right to review unless the comments amount to fundamental error. *State v. Thomas*, 130 Ariz. 432, 435, 636 P.2d 1214, 1217 (1981).

2. *State v. Gonzales*, 105 Ariz. 434, 436-37, 466 P.2d 388, 390-91 (1970).

3. *(Id.)*.

4. *State v. Dumaine*, 162 Ariz. 392, 401, 783 P.2d 1184, 1193 (1989).

5. *(Id.)*. For an example of each type of vouching *see*, *State v. Vincent*, 159 Ariz. 418, 768 P.2d 150 (1989).

6. *State v. Salcido*, 140 Ariz. 342, 681 P.2d 925 (App. 1984).

7. *Doyle v. Ohio*, 426 U.S. 610, 96 S.Ct. 2240 (1976), *cited with approval in State v. Mauro*, 159 Ariz. 186, 197, 766 P.2d 59, 70 (1988).

8. *Wainwright v. Greenfield*, 474 U.S. 284, 291 n.6, 106 S.Ct. 634, 638 n.6 (1986); *State v. Ramirez*, 178 Ariz. 116, 125, 871 P.2d 237, 246 (1994).

9. *Griffin v. California*, 380 U.S. 609, 85 S.Ct. 1229 (1965). *See, also, State v. Church*, 175 Ariz. 104, 854 P.2d 137 (App.1993); *Arizona Constitution, Article 2, Section 10*; A.R.S. § 13-117(B).

It should be noted that prosecutors may comment about the failure of the accused to present exculpatory evidence so long as they do not call attention to the accused's failure to testify. An exception to this rule occurs when it appears that only the accused could explain away or contradict the State's evidence. *See, State v. Fuller*, 143 Ariz. 571, 694 P.2d 1185 (1985).

10. *State v. Schrock*, 149 Ariz. 433, 719 P.2d 1049 (1986); *State v. Church*, 175 Ariz. 104, 107, 854 P.2d 137, 140 (App. 1993).

11. *State v. Abney*, 103 Ariz. 294, 440 P.2d 914 (1968). To be in error, it is not necessary that the prosecutor say, "I believe the defendant is guilty." An argument such as: "He's guilty, guilty, guilty," by virtue of its sheer repetition, becomes a statement of personal opinion as to guilt. *State v. Filipov*, 118 Ariz. 319, 324, 576 P.2d 507, 512 (Ct. App. 1977).

12. *State v. Islas*, 119 Ariz. 559, 582 P.2d 649 (App. 1978).

13. *State v. Hernandez*, 170 Ariz. 301, 307, 823 P.2d 1309, 1315 (App. 1991).

14. *State v. Williams*, 113 Ariz. 442, 556 P.2d 317 (1976).

15. *State v. Gonzales, supra*, note 2, at 437, 466 P.2d at 391.

16. *State v. Merryman*, 79 Ariz. 73, 75, 283 P.2d 239, 241 (1955).

17. *State v. Comer*, 165 Ariz. 413, 426-27, 799 P.2d 333, 346-47 (1990).

18. *State v. Henry*, 176 Ariz. 569, 581, 863 P.2d 861, 873 (1993).

19. *State v. Filipov, supra*, note 11.

20. *See, e.g., State v. Ottman*, 144 Ariz. 560, 562, 698 P.2d 1279, 1281 (1985).

21. *United States v. Payne*, 2 F.3d 706, 711-15 (6th Cir. 1993).

22. *State v. Sullivan*, 130 Arizona 213, 219, 635 P.2d 501, 507 (1981).

23. *People v. Threadgill*, 166 Ill. App. 3d 643, 649, 520 N.E.2d 86, 92 (1988).

24. *State v. Turrentine*, 152 Ariz. 61, 67, 730 P.2d 238, 244 (App. 1986).

25. *State v. Cortez*, 101 Ariz. 214, 215, 418 P.2d 370, 371 (1966). *See, also, State v. Woodward*, 21 Ariz. App. 133, 516 P.2d 589 (1973) (During closing, prosecutor implied that judge looked with favor on the prosecution of the accused.).

26. *United States v. Smith*, 962 F.2d 923, 933-34 (9th Cir. 1992).

27. *See, State v. Stambaugh*, 121 Ariz. 226, 228, 589 P.2d 469, 471 (App. 1978).

28. *State v. Boozer*, 80 Ariz. 8, 13, 291 P.2d 786, 789 (1955).

29. *State v. Johnson*, 122 Ariz. 260, 267, 594 P.2d 514, 521 (1979); *State v. Evans*, 88 Ariz. 364, 371, 356 P.2d 1106, 1110 (1960).

30. *State v. Denny*, 119 Ariz. 131, 579 P.2d 1101 (1978).

31. *See, e.g., State v. Woods*, 141 Ariz. 446, 455, 687 P.2d 1201, 1210 (1984). Ω

Sever Counts, or Get It Over All At Once? You'd Better Think Twice

by Garrett Simpson,
Deputy Public Defender--Appeals Division

The failure to sever counts can produce a trial so fundamentally unfair that it deprives clients of due process of law and the right under the Sixth Amendment and art. 2, §24 of the Arizona Constitution to juries untainted by severable, prejudicial charges.

It may appear attractive to waive severance, compressing two or more trials into one, or to think of severance as a *pro forma* futility to be argued lightly, but think twice. You may have winners if the charges are tried separately, and the state may be employing joinder opportunistically as a mere pretext to unfairly malign your client's unquestioned probity.

The most significant case on the Arizona law of severing counts remains *State v. Stuard*, 176 Ariz. 589, 599, 863 P.2d 881 (1993), where the defendant was charged out of a series of attacks on elderly women living alone. The sense of Stuard is that to avoid severance, a substantial portion of the evidence for each joined offense must be admissible in the trial of the other. See also, *State v. Atwood*, 171 Ariz. 576, 832 P.2d 593 (1992).

The rule for joinder must be read with the rule for severance, *State v. Henderson*, 116 Ariz. 310, 569 P.2d 252 (App. 1977). Rules 13.3(a)(1)(2) and (3), Arizona Rules of Criminal Procedure (hereafter "Rule ___"), provide offenses stated in separate counts may be joined for trial if they,

> (1) Are of the same or similar character; (2) Are based on the same conduct or are otherwise connected together in their commission; or (3) Are alleged to have been part of a common scheme or plan.

The general severance rule, Rule 13.4(a), provides:

> In General. Whenever 2 or more offenses . . . have been joined for trial, and severance of any or all offenses . . . is necessary to promote a fair determination of the guilt or innocence of any defendant of any offense, the court may on its own initiative, and shall on motion of a party, order such severance.

The state may assert superficial connections to join--or to oppose severance of--genuinely unrelated charges. Be alert for "connections" between offenses that on reflection are merely fortuitous: viz., if a man steals a shirt, and is days later arrested for D.U.I. while wearing that shirt, there is no basis for jointly trying the theft and D.U.I.

Severance and joinder orders are reviewed on appeal for abuse of discretion, *State v. Cruz*, 137 Ariz. 541, 544, 672 P.2d 470, 473 (1983). An "abuse of discretion" is "an exercise of discretion which is manifestly unfair, exercised on untenable grounds or for untenable reasons," *State v. Woody*, 173 Ariz. 561, 563, 845 P.2d 487, 498 (App. 1992) quoting *Williams v. Williams*, 166 Ariz. 260, 265, 801 P.2d 495, 500 (App. 1990). In the particular context of joinder/severance, abuse of discretion is established by the defendant's articulation of the prejudice suffered absent the severance, *Atwood*. Therefore, define clearly for the trial judge the prejudice your client will suffer without the severance. Once you have clearly stated your prejudice, the trial court is under a duty to properly weigh the grounds and the prejudice to the client, *Cruz*; *State v. Mauro*, 149 Ariz. 24, 27, 716 P.2d 393 (1986). If your prejudice argument is focused, you will either tip the judge your way, or you will have made your record for appeal.

The joinder cases commended by *Stuard* will direct you in employing the rules. Rule 13.3(a)(2) was used in *Mauro* to join child abuse and murder counts involving the same victim. In *State v. Gretzler*, 126 Ariz. 60, 72-73, 612 P.2d 1023 (1980), the rule was employed to join two sets of crimes where the defendants knew their getaway car from the first set was being sought, so they committed new crimes to get a new getaway car. In *State v. Comer*, 165 Ariz. 413, 419, 799 P.2d 333, 339 (1990) offenses were properly joined pursuant to the rule because the evidence was clear both offenses were committed in order for the defendant to obtain provisions. The court in *State v. Newman*, 122 Ariz. 433, 436, 595 P.2d 665, 668 (1979) analyzed the rule as follows: are the two incidents connected together by similar and related conduct on the part of the defendant? In *State v. Martinez-Villareal*, 145 Ariz. 441, 445-446; 702 P.2d 670, 674-675 (1985), the court discussed at length consolidation of offenses under Rule 13.3(a)(2). The court said that *consolidation under the rule was proper where the evidence of one crime was so connected with the other case that it would have necessarily been admitted as evidence even if the first had not been charged as a separate count*. See also, *State v. Villavicencio*, 95 Ariz. 199, 201, 388 P.2d 245, 246-47 (1964). The test is, *are the different crimes provable by the same evidence? Id.*; *Gretzler*; *State v. Via*, 146 Ariz. 108, 114-116, 704 P.2d 238, 244-246 (1985).

As the court noted in *Martinez-Villareal*, the federal rule on joinder, Rule 8(a), Federal Rules of

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Criminal Procedure, is similar to Arizona's Rule 13.3(a) and permits joinder where "the offenses arose out of a series of connected acts, and the evidence as to each count, of necessity, overlaps," *James v. United States*, 416 F.2d 467, 474 (5th Cir. 1969). Ask yourself, do the counts "overlap"? *James*. Is most of the evidence admissible in proof of one offense admissible to prove the other? *United States v. Barney*, 568 F.2d 134, 135 (9th Cir. 1978). Finally, joinder is permitted in federal court where there are common elements of proof in the joined offenses, *United States v. Wilson*, 715 F.2d 1164 (7th Cir. 1983). Do common elements of proof exist in your case? Are the offenses "entwined" as in *Martinez-Villareal*? Are they mutually admissible, as in *State v. Williams*, ___ Ariz. ___, 200 Ariz.Adv.Rep. 11, 14-16 (1995)?

The most significant case on the Arizona law of severing counts remains *State v. Stuard* . . .

The state may represent that even if severed, the second offense would be admissible in the trial of the first as a bad act under A.R.E. 404(b), Arizona Rules of Evidence. Not so fast.

Evidence of other crimes, wrongs or acts may be admissible:

> **Rule 404. Character Evidence not Admissible to Prove Conduct; Exceptions; Other Crimes**
>
> * * * *
>
> **(b) Other crimes, wrongs, or acts.** Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

However, the evidence of those other crimes, wrongs and acts must be **relevant** to the case in trial before the court can engage in the 404(b) analysis, *State v. Schurz*, 176 Ariz. 46, 52, 859 P.2d 156 162 (1993). In essence, if it's not relevant, it can't come in. Even so, 403 and 404(b) prohibit introduction of relevant evidence if the relevance is exceeded by the prejudice. If the state alleges there is cross-admissibility on the basis of a common scheme or plan, make the state show a "visual connection" between the incidents, that is, evidence that shows similarities between the crimes where one could expect to find differences, *State v. Walden*, ___ Ariz. ___, 201 Ariz.Adv.Rep. 5 (1995). If there is no connection, there is no cross-admissibility.

What if your motion is nevertheless denied? Even if the offenses are properly joined or evidence of a bad act is allowed, your client might still suffer unfair prejudice if the jury uses the evidence of other crimes as probative of character in violation of 404(a), 404(b) and 405; *Stuard*. Whether not severed or admitted under Rule 404(b), a court must act to prevent prejudice, *Stuard*. The client is therefore entitled to an instruction limiting the jury's use of the evidence to the permissible purpose, *id*. The trial court has a "special obligation to ensure that the probative value of the evidence for the purpose offered is sufficiently great in the context of the case to warrant running that risk," Udall, *Arizona Evidence* §84, at 180; see also *State v. Taylor*, 169 Ariz. 121, 125, 817 P.2d 488, 492 (1991). This strongly suggests that the court has an affirmative duty to give a limiting instruction. The trial court may have an affirmative duty to instruct the jury to consider each charge separately, *id.*; *Atwood*.

But don't let the trial court take the initiative, ask for the limiting instruction yourself. It's your client's last line of defense when the jury is going to hear the whole ungainly story despite your best efforts to keep the trial focused on what's really important: whether the state has proven its charge in the present case.

In all events, make sure the motion is timely and re-urged periodically as new aspects of prejudice to your client become apparent. And, don't let the motion be merely rule-driven. Cite the rule, yes, but constitutionalize the motion with the Sixth Amendment, its state counterpart in art. 2, §24 of the Arizona Constitution **and** the state and federal Due Process clauses. Ω

Justice Without Delay: Speedy Trial-Type Rights

By Donna Lee Elm and Lisa Posada, Deputy Public Defenders

We call it speedy trial rights. We mean it took the government too long. It is, in fact, a number of distinct rights and remedies. There are the better-known constitutional "speedy trial" rights and Rule 8 provisions, the lesser-known "due process" pre-indictment and probation violation delays, and a vast, untapped potential for "justice without unnecessary delay" under the Arizona Constitution.

Note that for an arrest to apply, it must be an arrest-and-held-to-answer.

I. Constitutional "Speedy Trial" Rights

The U.S. Constitution provides that "the accused shall enjoy the right to a speedy and public trial." Sixth Amendment. Arizona's constitutional counterpart is "an accused shall have the right . . . to a speedy public trial." Art. 2, §24. The Arizona Supreme Court has held that that right is equivalent to the 6th Amendment one.

Because this "speedy trial" right applies to "an accused," it only accrues once a suspect rises to the level of being "accused." That is, upon "either a formal indictment or information or else the actual restraints imposed by arrest and holding to answer a criminal charge." *United States v. Marion*, 404 U.S. 307, 320, 92 S.Ct. 455, 463 (1971). Note that for an arrest to apply, it must be an arrest-and-held-to-answer. So, when cases are scratched, "speedy trial" rights begin anew upon subsequent arrest (when the defendant is held to answer). *State v. Robertson*, 118 Ariz. 343, 576 P.2d 531 (App. 1978).

Consequently, the defense cannot base a "speedy trial" claim on unnecessary delay in indicting a suspect. *See* §III (below) regarding pre-indictment delay. However, we can in cases where the defendant is indicted but his subsequent arrest is delayed. *Doggett v. United States*, 112 S.Ct. 2686 (1992); *State v. Gutierrez*, 121 Ariz. 176, 589 P.2d 50 (App. 1978). In *Gutierrez*, the court treated the issue as a right to a speedy arrest on "speedy trial" grounds. 121 Ariz. at 179, 589 P.2d at 53.

There are no bright line time limitations for "speedy trial" violations. However, the Supreme Court indicated that courts should apply a balancing test, weighing salient factors. *Barker v. Wingo*, 407 U.S. 514, 530, 92 S.Ct. 2182, 2192 (1972). *Barker* set forth the criteria to assess a speedy trial violation, identifying four factors:

1) the length of delay;
2) the reason for the delay (whose fault it was);
3) whether the defendant asserted his rights; and,
4) prejudice to the defendant.

This list is not exhaustive, and other relevant factors can apply. *Id.* at 533, 92 S.Ct. at 2193. The Supreme Court also made it clear that none of the criteria are "either a necessary or sufficient condition" to establish speedy trial violations. *Id.* at 533, 92 S.Ct. at 2193. The *Barker* criteria have been adopted by Arizona courts. *See, e.g., Gutierrez.*

A. Length of Delay

The first factor, length of delay, can weigh very heavily against the state. It serves as a triggering mechanism. *Barker*, 407 U.S. at 530, 92 S.Ct. at 2192. One year is more than sufficient to trigger a *Barker* inquiry. *See, e.g., Paine v. McCarthy*, 527 F.2d 173 (9th Cir. 1975), *cert. denied* 424 U.S. 957 (1976); *Humble v. Superior Court, Maricopa County*, 179 Ariz. 409, 880 P.2d 629 (App. 1993), *rev. denied* (1994).

The problem with inordinate delay is that obtaining reliable evidence for the defense decreases with the passage of time. *Barker* explicitly recognized that defenses are impaired from "time's erosion of exculpatory evidence and testimony." Moreover, since it is often impossible for the defendant to prove what evidence he **might have had** that he no longer has (the quandary of proving a negative), lengthy delays must weigh all the heavier against the state. *Doggett*, 112 S.Ct. at 2692-93 (citing *Barker*).

B. Reason for Delay

The second factor, reason for delay, can be critical. Whether it was the defendant's or the government's fault matters, and whether the government acted in bad faith or negligently can be dispositive. It is the state that must provide reason for its dereliction.

> When the period of time that has elapsed after the defendant is held to answer is of such length as to be manifestly excessive and unreasonable,

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> it may be incumbent on the State, in order to avoid dismissal of the indictment, to justify the delay.

State v. Ivory, 278 Ore. 499, 564 P.2d 1039, 1043 (1977).

There is an affirmative obligation on the government (in the form of both the courts and prosecution) to make an effort to find a defendant and initiate prosecution. *State v. Gonzales*, 582 P.2d 630 (Alaska 1978). Reasonable investigation (exercising "due diligence") must be done, and cursory inquiries (especially when there were leads that would bear fruit if pursued) is insufficient. Our own Patti O'Connor successfully litigated this issue in *Humble*. In that case, though the defendant had moved, the state had his father's phone number, his Social Security number (and he was receiving unemployment benefits), and the name of his employer. Merely leaving the server's business card at a residence and later mailing the summons (certified--not received) was insufficient. Always look into what investigative leads the government had and what steps they took to locate the defendant.

Hence courts have carefully scrutinized cases where the prosecution and law enforcement personnel seeking to serve a defendant knew he was incarcerated.

There is an additional burden on the government when the defendant is incarcerated during the delay period. We have seen cases where the state waits until a defendant is about to be released from jail or prison before prosecuting a second case. Hence courts have carefully scrutinized cases where the prosecution and law enforcement personnel seeking to serve a defendant knew he was incarcerated. *E.g., Zurla v. State*, 109 N.M. 640, 789 P.2d 588 (1990). In one case, the prosecutor did not actually know that the defendant was incarcerated: "although the evidence does not show that the delay was intentional, the State is presumed to know a defendant's whereabouts when he is in its custody." *State v. Tartaglia*, 109 N.M. 801, 791 P.2d 76, 78 (App. 1990). Thus, the state will be held to imputed knowledge that a defendant is incarcerated.

The state is not necessarily excused from delay in service just because the defendant is out of Arizona. If he flees the state, knowing that charges are pending, the government is exempt from its obligation to try to locate him. *State v. Miller*, 161 Ariz. 468, 778 P.2d 1364 (App. 1989). On the other hand, "the state's failure to exercise due diligence should [not] be excused by the mere fortuity of a defendant's innocent absence from Arizona." *Snow v. Superior Court, Maricopa County*, 192 Ariz. Adv. Rep. 10, 12 (App. June 6, 1995).

The state sometimes concedes that it dropped the ball, but claims no bad faith, that it was unintentional, merely negligent. However, negligence does not excuse delay, and it weighs against the state. *Doggett*, 112 S.Ct. at 2693. Official negligence in failing to serve the defendant required reversal in *Doggett*. Moreover, "the weight we assign to official negligence **compounds over time** as the presumption of evidentiary prejudice grows. [Emphasis added.]" *Id.*; *and see Arizona v. Youngblood*, 488 U.S. 51, 109 S.Ct. 333 (1988).

In addition, serious negligence by the police in pre-arrest delay (not even trying to serve) has justified dismissal even when there was only minor prejudice. *State v. Willingham*, 510 P.2d 1339 (Ore. App. 1973). Courts have been outraged when the state makes "no efforts at all." In *State v. Wirth*, the state did not know where to locate the defendant, so never tried to serve her. But, her roommate and sister (known to police) knew where she was, a bill collector had easily found her, she had left forwarding addresses, and she had kept up-to-date vehicle registration. The court lambasted police inaction: "they are **investigative** agencies, and have a duty to employ their investigative resources," concluding that "Where no efforts at all were made, dismissal is clearly required. [Emphasis in original.]" *Id. Wirth*, 39 Wash. App. 550, 694 P.2d 1113, 1115, *rev. denied* (1985).

This was also the court's sentiment in the *Tartaglia* case. The state did not know where the defendant (who was imprisoned on an unrelated matter) was. But, the court imputed the knowledge, and held that "Bureaucratic indifference . . . will weigh more heavily against the State . . . where the State fails to make an effort to locate a defendant who is imprisoned in its own corrections facilities." 791 P.2d at 78.

On the other hand, if the delay is due to the defendant's actions, it is very difficult to prevail. For instance, if the defendant gave officers a false name (thereby hampering police efforts to arrest him), he can hardly complain that it took them too long to find him. Similarly, if he fled prosecution, ducked service, or went into hiding, he cannot complaint that his trial was delayed. *See Gutierrez*.

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That happened in *Gutierrez*. Deputies trying to serve him contacted his sister (whom he saw soon afterwards, but supposedly she did not tell him of the summons) and his aunt (who stated that he and his attorney were aware of the summons), but they could not contact the attorney since no one seemed to know who that was; finally, deputies went to his job, but Gutierrez was no longer there. The court assumed that the delay in serving him was due to his and his relatives' hindrance. Therefore, his "speedy trial" claim was denied.

The state sometimes justifies pre-arrest or pre-indictment delay because it is still investigating the charges. *Marion*, 404 U.S. at 324, 92 S.Ct. at 465 ("investigative delay is fundamentally unlike delay undertaken by the Government solely 'to gain tactical advantage over the accused'"); *United States v. Lovasco*, 431 U.S. 792, 795, 97 S.Ct. ___, 2051 (1977); *State v. Petzoldt*, 172 Ariz. 272, 836 P.2d 982 (App. 1991), *rev. denied* (1992). Therefore, delay while the state gathered witness statements and evidence, *State v. Hall*, 129 Ariz. 589, 633 P.2d 398 (1981), or to protect identity of undercover officers, *State v. Torres*, 116 Ariz. 377, 569 P.2d 807 (1977), does not violate "speedy trial."

Counsel should examine what evidence the state had at various times to see if that claim is substantiated. Remember that the state has an affirmative obligation under the "speedy trial" clauses to pursue the case. They must reasonably "speedily" investigate the crime. Therefore, they cannot lie idle when there are reasonable avenues of investigating the case. *See, e.g., Humble; Wirth.*

C. Asserting "Speedy Trial" Rights

The third factor, whether the defendant asserted the right to a "speedy trial," is not necessarily dispositive. Many "speedy trial" claims prevailed despite lack of demand. *See, e.g., State v. Tucker*, 133 Ariz. 304, 651 P.2d 359 (1982); *Watson v. People*, 700 P.2d 544 (Colo. 1985); *City of Elkhart v. Bollacker*, 243 Kan. 543, 757 P.2d 311 (1988). Technically, Rule 8 obviates the requirement to assert a "speedy trial" demand. *Tucker*. But, because asserting the right is a *Barker* factor, we should never neglect to demand it. Moreover, many jurisdictions have found that as long as a defendant asserts the right anytime before trial, he has satisfied this factor. *State v. Bailey*, 201 Mont. 473, 655 P.2d 494 (1982).

Generally, the earlier a "speedy trial" demand is lodged, the better. An early assertion weighs in the defendant's favor. *Tartaglia*. On the other hand, a very late demand (especially when the issue was apparent for some time) weighs against the defendant. *State v. Stimson*, 41 Wash. App. 385, 704 P.2d 1220 (1985)(counsel knew at the time trial was set); *State v. Durry*, 4 Haw. App. 222, 665 P.2d 165 (1983). In the middle range, when the defendant waited six months after he had complained about delay to assert "speedy trial," it weighed in neither party's favor. *State v. Gallegos*, 109 N.M. 55, 781 P.2d 783 (App. 1989).

When a "speedy trial" demand is asserted late, and appears to be contrived for ulterior motives, courts seldom grant relief. For instance in *Durry*, trial took place 19 months after arrest, but the defendant raised a "speedy trial" claim on the eve of trial. The court was concerned that the untimely filing itself delayed the trial. Furthermore, when the court offered to appoint other counsel (when Durry objected to her lawyer's request for a continuance) and Durry declined, that diminished the weight given to the eventual assertion.

Defendants without counsel can often be excused for not asserting "speedy trial" rights. A distinction is made between a counselled failure to demand and an uncounselled one. *Estrada v. State*, 611 P.2d 850 (Wyo. 1980). However, if the defendant puts off retaining counsel to delay trial itself, there is no "speedy trial" relief. *State v. Holtslander*, 102 Idaho 306, 629 P.2d 702 (1981).

D. Prejudice to the Defense

The fourth factor, prejudice to the defense, is the most common barrier to a successful "speedy trial" claim. There is case law that turns on the lack of established prejudice, and it is often cited to counter an otherwise viable "speedy trial" challenge. Consequently, this factor must be addressed aggressively. The problem is that actual prejudice is very hard to prove. It normally is the loss of some witness or physical evidence that would contradict the state's case or support a defense. Since we cannot find the witnesses, we cannot say what they would have said.

The first line of attack is to point out that prejudice is not an absolute requirement. None of the *Barker* factors alone is sufficient to determine "speedy trial." *Barker*, 407 U.S. at 533, 92 S.Ct. at 2193. Indeed, in *Moore v. Arizona*, 414 U.S. 25, 94 S.Ct. 188 (1973), a "speedy trial" violation prevailed despite no showing of prejudice. Additionally, when the other factors strongly favor the defendant, lack of demonstrable prejudice has not prevented dismissal. *See Tartaglia*, 791 P.2d at 78; *Ivory*, 564 P.2d at 1044 (when there is strong grounds to dismiss from the other factors, a showing of just "some reasonable possibility of prejudice" suffices).

The second line of attack is to argue the difficulty of proving the negative. Many courts have accorded little

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weight to the prejudice factor just because of this. *See, e.g., Tartaglia*, 291 P.2d at 78.

> [I]t does not follow that prejudice--or its absence, if the burden of proof is on the government--can be satisfactorily shown in most cases. . . . concrete evidence of prejudice is often not at hand. Even if it is possible to show that witnesses and documents, once present, are now unavailable, proving their materiality is more difficult. And it borders on the impossible to measure the cost of delay in terms of dimmed memories of the parties and available witnesses.

Dickey v. Florida, 398 U.S. 30, 53, 90 S.Ct. 1564, 1576 (1970) (Brennan, J., concurring). Other courts have not required proof of prejudice with certainty since "it would be too harsh." *Ivory*, 564 P.2d at 1044.

The third line of attack is to request treatment under the concept of "presumptive prejudice." Arizona has recognized the presumptive prejudice standard. *E.g., Gutierrez*. Presumptive prejudice arises with excessive delay; courts can presume prejudice due to loss of memory, evidence, witnesses, and means of finding those when too much time passed.

Delays approaching one year are presumptively prejudicial. *Doggett*, 112 S.Ct. at 2690-91; *Humble*. There have been cases where presumptive prejudice has been found in delays of under a year, for example: 11 months, *Gutierrez*; 10.5 months, *State v. Owens*, 112 Ariz. 223, 540 P.2d 695 (1975), and *Ivory*; 9 months, *Boccelli v. State*, 109 Ariz. 287, 508 P.2d 1149 (1973); 7 months, *State v. Almeida*, 509 P.2d 549 (Haw. 1973); and 6.5 months, *Willingham*.

While presumptive prejudice **alone** does not meet "speedy trial" criteria, *Doggett*, 112 S.Ct. at 2693, and *United States v. Loud Hawk*, 474 U.S. 302, 315, 106 S.Ct. 648, 656 (1986), it can suffice when other factors weigh heavily. For instance, given the state's utter indifference in locating a defendant (as in *Humble* or *Tartaglia*), presumptive prejudice would suffice. Furthermore, presumptive prejudice satisfies the *Ivory* requirement of showing "some reasonable possibility of prejudice" when other *Barker* factors are strong.

II. Rule 8 Time Limitations

Rule 8 provides bright line time standards for assessing speedy trial-type violations. It also adheres upon indictment or information. Rule 8.2(a). It mandates that:

> Every person against whom an indictment, information or complaint is filed **shall** be tried by the court having jurisdiction of the offense within 150 days of the arrest or service of summons. [Emphasis added.]

If the defendant is in custody on other charges, he should ask for speedy disposition. Rule 8.3(b)(1) provides that:

> Any person who is imprisoned in this state **may** request final disposition of any untried indictment, information or complaint pending against the person in this state. The request shall be in writing addressed to the court in which the charge is filed and to the prosecutor charged with the duty of prosecuting it, and shall set forth the place of imprisonment. [Emphasis added.]

Nonetheless, his failure to make a Rule 8.3 demand does not work against him. The state may argue that an incarcerated defendant who failed to assert this somehow waived his rights. But, it is important to note that Rule 8.3(b)(1) is permissive, while Rule 8.2(a) is mandatory. As such, the waiver rule should only be applied when the defendant has clearly and expressly waived his rights; no implied waiver can outweigh Rule 8.2's express mandates.

Once a defendant has established a prima facie violation of the Rule 8 time limit, the state usually seeks exclusion of time under Rule 8.4. However, the state bears the burden of establishing grounds for excluding the delay. *Humble*. Rule 8 does not require the defendant to make any demand to preserve his rights. *Tucker*. "A defendant has no duty to bring himself to trial." *Barker*, 407 U.S. at 527, 92 S.Ct. at 2190.

Rule 8 provides a bright line standard. Courts have held that it is more restrictive than constitutional "speedy trial" rights which require analysis of a number of factors aside from length of delay. *State v. Olson*, 146 Ariz. 336, 705 P.2d 1387 (App. 1985). Thus, if the state violates Rule 8, the remedy is dismissal, with or without prejudice. Rule 8.6.

While that seems initially attractive, the remedy can be a paper tiger. In practice, the case is normally dismissed without prejudice. *State v. Granados*, 172 Ariz. 405, 837 P.2d 1140 (App.), *rev. denied* (1991)(Rule 16.5, governing dismissals, favors dismissal without prejudice, and one with prejudice should only be done when the interests of justice require it). The state can, and often does, refile. When that happens, the Rule 8 time periods start anew. *State v. Rose*, 121 Ariz. 131, 589 P.2d 5 (1978). The state thus gets twice as much

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time to get the case to trial.

In order to challenge a refiling, the defense bears the burden of proving that the refiling was done in bad faith or the defendant was prejudiced thereby. *State v. McDonald*, 117 Ariz. 180, 571 P.2d 677 (App. 1977). Though prosecutorial bad faith is not easily alleged, if there is evidence that the dismissal and refiling were done for no other reason than that the state was not ready to proceed timely to trial, we can argue that the refiling was done purely in derogation of Rule 8 rights. *See State v. Hanger*, 146 Ariz. 473, 706 P.2d 1240 (App. 1985).

Bear in mind that there is an affirmative obligation on defense counsel to advise the court when Rule 8 time is about to expire. Rule 8.1(d). We could lose a dismissal or one with prejudice if we realized the time was about to run out and neglected to inform the judge. *Tucker* (dismissal without prejudice); *State v. Techy*, 135 Ariz. 81, 659 P.2d 40 (App. 1982)(excluding time so no Rule 8 violation).

III. Pre-Indictment Delay

While 6th Amendment "speedy trial" and Rule 8 rights only start to run at the time of indictment or information, a defendant nonetheless has rights to avoid delay in getting the prosecution started. These arise out of the "due process" clauses. U.S. Const., 4th and 14th Amendments; Ariz. Const., Art. 2, §4. *Doggett*.

To trigger "due process" protections, the defense must show "that the state unreasonably delayed prosecution and that such delay prejudiced his defense." *State v. Saiz*, 103 Ariz. 567, 570, 447 P.2d 541, 544 (1968); *State v. Marks*, 113 Ariz. 71, 74, 546 P.2d 807, 810 (1976). Thus for a pre-indictment delay argument to prevail, there must be a showing of actual (not presumptive) prejudice and an inquiry into the reason for the delay. *Marion*. Proof of prejudice is generally a necessary but not sufficient element of a due process claim concerning pre-indictment delay, and the inquiry must also consider the reasons for the delay. *Lovasco*.

Arizona has promulgated a two-pronged test for analyzing whether a pre-indictment delay rises to the level of violating "due process":

> 1) the prosecution intentionally delayed proceedings to gain a tactical advantage over the defendant; and,
>
> 2) the defendant has actually been prejudiced by the delay.

State v. Broughton, 156 Ariz. 394, 752 P.2d 483 (1988)(citing Hall); *Torres*; *Marks*.

A. Actual Prejudice

The singular greatest difficulty with pre-indictment delays is usually establishing actual prejudice. *See* §I.D, above, for discussion of proving prejudice. The prejudice necessary to trigger "due process" concerns must be "actual and substantial." *State v. Van Arsdale*, 133 Ariz. 479, 653 P.2d 36 (App 1982). Its proof must be definite, not speculative. *United States v. Valentine*, 783 F.2d 1413, 1416 (9th Cir. 1986). The defendant has the burden of proving not only the loss of a witness, but also that the absence impaired his ability to construct a meaningful defense. *Stoner v. Graddick*, 751 F.2d 1535 (11th Cir. 1985); *Torres*. In the case of a missing testimony, the proof should include some of the content of that testimony.

Thus, *Hall* noted that a "stale investigation" in and of itself is not necessarily violative of due process rights. Moreover, though any delay may result in prejudice, it may prejudice the state's case as well as the defendant's. Furthermore, prejudice above and beyond the workings of a clogged judicial system must be shown. *Broughton*. However, if witnesses have disappeared, their memories fail over time, or exculpatory is no longer available (as in breath samples in DUI cases), the defense may succeed in establishing real, not speculative, prejudice. *United States v. Mays*, 549 F.2d 670 (9th Cir. 1977).

In *Lovasco*, the Court held that a court applying a due process clause to pre-indictment delay has "to determine only whether the action complained of . . . violates those fundamental conceptions of justice which lie at the base of our civil and political institutions and which define the community's sense of fair play and decency." Arguably, this allows for a case by case analysis in arguing that the government's delay violated the aforementioned principles.

B. Delay

The second hurdle is establishing the reason for the pre-indictment delay. Once a defendant has established actual prejudice, it becomes incumbent upon the government to provide its reason for the delay. *Mays*, 549 F.2d at 678. Though Arizona cases (*Broughton* and *Van Arsdale*) require that the delay be intentional or for gaining a tactical advantage, the 9th Circuit disagreed:

> to require the defendant to prove, in addition to actual prejudice, specific bad intent on the part of the government places an extremely difficult burden on a defendant; one which he may not be able to meet without considerable time and

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> expense on his part. Access to the evidence of such intent would be difficult to obtain as it would largely be in the government's possession. In addition, a tangential issue may arise as to whether some claim of privilege by the government would prevent the defendant from obtaining the necessary evidence.

Mays. The *Mays* court went on to state that negligent conduct can also be considered since the ultimate responsibility for such circumstances must rest with the government rather that the defendant.

IV. "Due Process" in Probation Violations

Probation violation proceedings are not trials, therefore "speedy trial" and Rule 8 do not apply to them. Time limits are set forth under Rule 27.7, and there are some constitutional guarantees under "due process" as well as "justice without unnecessary delay."

While that [Rule 8] seems initially attractive, the remedy can be a paper tiger.

The time frames of Rule 27.7 commence when warrant is served--not at the initial appearance. *State v. Lee*, 27 Ariz. App. 294, 554 P.2d 890 (1976). They are not jurisdictional, so the probationer is not **entitled** to dismissal if they are violated. *State v. Huante*, 111 Ariz. 236, 527 P.2d 281 (1974). Counsel should nonetheless seek dismissal, arguing the factors relevant to "speedy trial" analyses. Note that time is tolled when the probationer has absconded from probation.

To prevail in a Rule 27.7 motion, you need to establish prejudice. *State v. Belcher*, 111 Ariz. 580, 535 P.2d 1297 (1975); *State v. Baylis*, 27 Ariz. App. 222, 553 P.2d 675 (1976). If the prejudice occurred while the probationer absconded, then he created his own prejudice, and he is out of luck. He has to show that it occurred during a delay after he has been arrested on the violation. Arizona courts have not applied a presumptive prejudice standard here yet, and probably will not (consistent with "due process" rather than "speedy trial").

There are cases where probation violations "ride" with trial on new charges. This common practice is actually denounced by appellate courts. *See State v. Flemming*, 205 Ariz. Adv. Rep. 3, 5-6 (App. Dec. 5, 1995); *State v. Fahringer*, 136 Ariz. 414, 666 P.2d 514 (App. 1983). If you want to get the probation violation finished early, cite those cases.

"Due process" applies to delays of probation and parole violations. *Gagnon v. Scarpelli*, 411 U.S. 778, 782, 93 S.Ct. 1765, 1760 (1973) (probation); *Morrissey v. Brewer*, 408 U.S. 471, 485, 92 S.Ct. 2593, 2602 (1972) (parole). Both the state and federal "due process" guarantees apply. *State v. Reidhead*, 152 Ariz. 231, 234, 731 P.2d 126, 129 (App. 1986). In evaluating the reasonableness of the delay, courts have focused on three factors:

> (1) length of delay;
> (2) reasons for the delay; and,
> (3) prejudice to the defendant.

Flemming at 6. These are the typical "due process" factors. *See* §§I and III, above, for discussions of the factors.

If the state delays initiating probation violation proceedings (when the defendant is already in custody on other charges), then "due process" can be urged for dismissal. The analysis is the same as pre-indictment delay and post-indictment/pre-arrest delay. The state must exercise due diligence to bring a probationer to hearing.

In *Flemming*, the state allowed the petition to lay dormant for 27 months while the defendant was imprisoned on other charges. The state argued that the defendant could show no actual prejudice. Never-the-less, the court stated:

> Even if we were to hypothesize a lack of prejudice to the defendant, the court has an obligation to give some meaning to its rules which are, after all, designed to provide for the type of due process mandated by the Constitution.

Id. at 6. Thus it would appear that actual prejudice is not always required, especially when the state's delay is egregious.

As discussed in §V, below, "justice without unnecessary delay" provided in art. 2, §11 of the Arizona Constitution may also afford some relief to a probationer whose hearing was improperly delayed by the state. In fact, it is surprising that the court of appeals did not invoke that clause in *Flemming*.

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V. Right to "Justice Without Unnecessary Delay"

Besides "speedy trial" language under art. 2, §24, the Arizona Constitution also provides that "Justice in all cases shall be administered . . . without unnecessary delay." Article 2, §11. This clause has great potential, but has been largely overlooked in speedy trial-type analyses.

There is no Arizona case law that specifically discusses what that clause means. In fact, only three, older cases mention it **at all**: *State v. Brannin*, 109 Ariz. 525, 514 P.2d 446, 448 (1973); *State v. Thornton*, 108 Ariz. 119, 493 P.2d 902, 904 (1972); *State v. Stout*, 5 Ariz. App. 271, 425 P.2d 582, 585 (1967). In each, §11 was simply recited in a litany of speedy trial-type grounds that included the federal and state constitutional guarantees, and statutory and rule grounds that invoke "speedy trial" language. The courts only discussed and analyzed the "speedy trial" claims; they never addressed the "justice without unnecessary delay" language. §11's presence in those cases is dicta.

This is not too surprising, given the time period when those cases were penned, which was well before the Arizona Supreme Court began to exercise its separate state grounds to extend constitutional rights beyond their federal counterparts. In the past decade, the Arizona Supreme Court has taken a much more serious and thoughtful look at its powers under our constitution. *See* Feldman, S. and Abney, D., The Double Security of Federalism: Protecting Individual Liberty Under the Arizona Constitution, 20 Arizona State Law Journal 115. Hence, the "justice without unnecessary delay" clause is ripe for interpretation and application as a separate state ground.

"Justice in all cases shall be administered . . . without unnecessary delay." Article 2, §11. This clause has great potential, but has been largely overlooked in speedy trial-type analyses.

Because there is no Arizona precedent to turn to, §11 can be raised as first impression. Our analysis can be guided, however, by rules of statutory interpretation and examination of similar language in other constitutions.

"Justice without unnecessary delay" should not be equated with "speedy trial." When the Founders drafted our constitution, they borrowed language from many established Bill of Rights clauses. They invoked 6th Amendment "speedy **trial**" language in §24, but chose to add a second clause that covered more than trial, providing for "**justice** without unnecessary delay" in §11. By that plain language, the clause covers much more than the indictment-to-jury-selection "speedy trial" provision.

Oregon's constitution has a similar clause: "justice without delay." Oregon treated it as equivalent to "speedy trial" rights of the 6th Amendment, and applied a *Barker v. Wingo* analysis. *Ivory*, 564 P.2d at 1042. However, there are two significant differences between the Oregon and Arizona constitutional provisions. First, Oregon does not have any separate "speedy trial" language in its constitution. We must presume that by enacting a "justice without unnecessary delay clause" above and beyond our "speedy trial" clause, our Framers meant something different than "speedy trial" rights. Second, we inserted the critical adjective "unnecessary" which is absent in Oregon's. By that wording, §11 guarantees relief when justice is delayed without any good reason, without "necessity." It shifts the focus from how soon trial should be to why trial did not occur sooner. Put another way, it does not address the affirmative right to have a trial quickly (which is typical "speedy trial" fare), but addresses the negative right to **not** have trial needlessly delayed. By its plain language, §11 is concerned with whether any delay is justified.

"Justice without unnecessary delay" thus should provide protections greater than "speedy trial" rights. It applies to non-"speedy trial" matters such as delays of preliminary hearings, indictments, discovery, motions, excessive mid-trial continuances, sentencings, or probation violation proceedings.

It additionally should provide protection distinct from "speedy trial." The triggering mechanism is not length of delay, but the state's lack of due diligence. §11 can be used in any context where the delay is patently "unnecessary," theoretically even matters typically handled under "speedy trial." Therefore when delay was uncalled for or unconscionable, even when there is no prejudice, we could argue for "justice without unnecessary delay." It may also protect citizens from a government that neglects a prosecution because it was too busy, cumbersome, or careless to attend to it. Ω

Challenging A.R.S. §13-604(T): Arizona's Gang Enhancement Statute

by Kristen M. Curry,
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In 1994, the Arizona Legislature added yet another nuclear missile to the county attorneys' arsenal of sentencing enhancements. This time it is A.R.S. §13-604(T), Arizona's "gang" enhancement statute.

A.R.S. §13-604(T) enhances a defendant's sentence by three years when the defendant is convicted of any felony that was committed with the "intent to promote, further or assist any criminal conduct by a criminal street gang." "Criminal street gang" is defined in Arizona as:

> [A]n ongoing formal or informal association of persons whose members or associates individually or collectively engage in the commission, attempted commission, facilitation or solicitation of any felony act and who has at least one individual who is a criminal street gang member.

A.R.S. §13-105(7). "Criminal street gang member" means:

> [A]n individual to whom two of the following seven criteria that indicate criminal street gang membership apply:
>
> (a) Self-proclamation;
> (b) Witness testimony or official statement;
> (c) Written or electronic correspondence;
> (d) Paraphernalia or photographs;
> (e) Tattoos;
> (f) Clothing or colors;
> (g) Any other indicia of street gang membership.

A.R.S. §13-105(8).

A.R.S. §13-604(T) and its related definitions raise serious constitutional questions of vagueness, overbreadth, due process, and equal protection; and every defense attorney should be prepared to challenge the use of this sentencing enhancement. Unfortunately, Arizona has yet to see any case law on the subject, so defense attorneys are treading new waters. However, we do have some guidance from the California courts which have interpreted the constitutional validity of their own gang enhancement statute.[1] Because Arizona's statute lacks the specificity seen in the California statute, California case law may aid defense attorneys in formulating arguments against the constitutionality of Arizona's statute.[2] The following issues are raised by the use of §13-604(T):

I. Vagueness and Overbreadth

The purpose of the vagueness doctrine is to: 1) ensure fair notice of prohibited activity, 2) prevent arbitrary enforcement, and 3) avoid inhibiting free expression when such rights are implicated.[3] When read in conjunction with the definitions of "criminal street gang" and "criminal street gang member," A.R.S. §13-604(T) presents vagueness issues in all three categories.

The statutes fail to give adequate notice of what type of activity is prohibited because they lack any specificity. A.R.S. §13-105(8) states that criminal street gang membership is indicated by seven criteria. However, the statute fails to designate what type of correspondence, paraphernalia, photographs, tattoos, clothing or colors are necessary to show that one is not only a gang member but a "criminal street gang member." Underlying questions regarding conduct remain unanswered. What makes some clothing, colors or tattoos more "criminal" than others? What kind of "paraphernalia" is prohibited? What is an "official statement"? What is considered "other indicia" of street gang membership?

The statute gives no objective standard, therefore, it raises dangers of arbitrary and discriminatory enforcement. Prosecutors can allege criminal gang activity based upon mere association or what **they** determine to be gang clothing, colors, photographs, tattoos, statements and paraphernalia. The statute does not define the items specifically enough to give police officers or prosecutors guidelines as to what is criminal behavior and what is not. Instead, it allows the state to instill its own personal notions into the definitions. All the prosecutor has to do is to present a gang "expert" who will express the opinion that the defendant's "look" and "friendships" indicate gang activity. Before you know it, your client is already half-way to getting three more years in the slammer. Essentially, it shifts the burden of proof to the defendant to prove his associations and expressions are not "criminal."

Thirdly, and most important, A.R.S. §13-604(T) infringes upon First Amendment rights. When the literal scope of a criminal statute is capable of reaching First Amendment expression, the vagueness doctrine requires a greater degree of specificity than normally required.[4] This infringement on First Amendment rights also makes A.R.S. §13-604(T) unconstitutionally overbroad.[5] Every element necessary to establish a "criminal street gang member" is protected speech under the First Amendment. Furthermore, in order to find the presence of a "criminal

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street gang" there must be at least one member or associate who has attempted or completed **any** felony act. There is no requirement that the act be gang related or that there even be a conviction. In other words, the defendant's freedom of association is criminalized by fraternizing with a person who was merely arrested for a felony act that had nothing to do with any gang.

In theory, a "criminal street gang" could encompass the police department or even the Boy Scouts if one of its members committed a felony act. Members wear the same clothing, colors, have insignias of membership, and declare themselves as a part of each group, all of which could be proved by photographs, self-proclamation, witness testimony, official statement, and written or electronic correspondence. In fact, just recently it was reported in the Arizona Republic that over 40 Phoenix police officers were being investigated for illegally selling assault rifles. Pursuant to A.R.S. §13-105(7), these officers could easily fit the description of a "criminal street gang." However, even if the officers were prosecuted, we all know that the state would **never** allege §13-604(T) against them even though the statutorily defined criteria have been met. Too much power is given to the prosecutor to pick and choose whom they want to suffer the extreme consequences of this sentencing enhancement. It is the role of the legislature, not the courts or police, to determine what conduct is prohibited.[6]

Essentially, it shifts the burden of proof to the defendant to prove his associations and expressions are not "criminal."

II. Due Process

A.R.S. §13-604(T) raises problems with due process because the statute does not provide a standard of conduct for those whose activities are proscribed and it lacks a standard for police enforcement. As discussed in the previous section, the statute gives wide discretion to the police and prosecutors to choose whom they want to suffer under this statute.

The statute also fails to give notice to the defendant about what conduct will come within A.R.S. §13-604(T). The defendant is not required to have any knowledge of the predicate act of one of the gang's members, thus, he is punished for pure association. The predicate act is not required to be gang related, it can be any type of felony, and there is no time limit on how recent the predicate act has to be. Two of the three required elements under §13-604(T), particularly the existence of both a criminal street gang member and a criminal street gang, could potentially be fulfilled without the defendant even knowing it. Furthermore, it is not difficult for the state to fulfill the third element because the statute does not clarify whether the defendant's "intent" goes only to the criminal act or whether the defendant must intend the crime to be gang related. In other words, the defendant may be an accomplice in a theft with a "criminal street gang member," yet the crime is not gang related. The defendant could be held liable under §13-604(T) if his accomplice has a prior felony for possession of marijuana, wears red, and has a tattoo. Their association makes them a "criminal street gang" under the statute and the defendant's actions "assisted" the "gang" in "criminal conduct" as required by §13-604(T). Clearly, there is a due process issue under this scenario.

III. Equal Protection

A.R.S. §13-604(T) and its related definitions create an unconstitutional classification and systematically discriminate against citizens who are lawfully engaging in the constitutionally protected activities of freedom of association and expression. The disparity between treatment can be seen in the following scenarios: three male lawyers have a secret ritual of threatening bank tellers, and one of them sees a teller and yells, "I'm going to burn your house down." The three lawyers work for the same firm but do not have similar tattoos or wear the same "colors" (they do, however, have similar "badges" that they proudly display to court personnel and often wear ugly, grey suits). They have committed a Class 1 misdemeanor pursuant to A.R.S. §13-1202(A)(1).

However, if a self-proclaimed gang member with a tattoo threatens to slash the tire of a rival gang member's car, he is guilty of a Class 4 felony under A.R.S. §13-1202(A)(3) and the sentence is enhanced by three years pursuant to A.R.S. §13-604(T). In the first scenario, there is no mandatory incarceration; in the second scenario, the minimum sentence the court could impose is a prison term of 5.5 years flat.

In both scenarios, A.R.S. §13-604(T) distinguishes between those who choose to exercise their constitutionally protected freedoms and those who do not. However, §13-604(T) also criminalizes conduct for some people which is protected for others (the case with the 40 police officers who allegedly sold illegal guns). This disparate treatment denies certain defendants equal protection under the law.

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IV. Other Arguments

A. Timeliness in Alleging §13-604(T)

In many instances, the state alleges A.R.S. §13-604(T) long after the indictment, as it does with prior convictions, dangerousness and crimes committed while on release. A.R.S. §13-604(P) sets forth that the court "shall allow the allegation of a prior conviction, the dangerous nature of the felony or the allegation that the defendant committed a felony while on release on bond or his own recognizance at any time prior to the date the case is tried . . ." A.R.S. §13-604(P) does not include this allowance for the enhancement under §13-604(T).

Moreover, there is a difference between §13-604(T) and other sentencing enhancers because the latter do not involve the defendant's mental state. The allegation of §13-604(T) is a separate factual question involving the defendant's "intent" at the time of the offense. Thus, the necessity for the grand jury to find sufficient probable cause regarding this issue before the indictment may be amended is even more compelling.

In theory, a "criminal street gang" could encompass the police department or even the Boy Scouts if one of its members committed a felony act.

B. Jury Question

Juries are already deciding the issue of dangerousness, prior convictions, and offenses committed while on bond or release pursuant to A.R.S. §13-604(P).[7] Other sentencing enhancements, particularly some of those found in A.R.S. §13-604.02, do not require a finding by the trier of fact and have been held to be questions for the judge.[8] However, despite the fact that there is no provision for a jury question under §13-604(T), it seems apparent that the jury should make that determination. Especially since §13-604(T) is not just a mere "status" question but requires a finding of the defendant's criminal "intent."[9]

C. Bifurcation

An additional question which §13-604(T) raises is whether this allegation should be determined in a separate trial. Having all issues in one trial creates substantial problems--chiefly, that of prejudice to the defendant. Other sentencing enhancements, such as prior convictions and release status, are determined in bifurcated trials because of similar problems. Character evidence, which would normally be inadmissible, could be introduced under §13-604(T) to prove gang involvement. The prosecutor would be allowed to introduce evidence of prior contacts and statements to police, photographs, prior convictions, paraphernalia, clothing and associations, all to prove that the defendant associated with a "criminal street gang." The waters are further muddied by allowing the prosecutor to introduce evidence of felony acts of **other** gang members, which may or may not have anything to do with their gang activities. The result would be a conviction based upon "who" the defendant is rather than "what" the defendant did. A bifurcated trial is absolutely necessary if the state is allowed to pursue the allegation of §13-604(T).

D. Double Punishment

In some instances, A.R.S. §13-604(T) creates a double punishment because the underlying felony already provides for an enhanced punishment for gang involvement. For example, A.R.S. §13-1202(A)(3) makes threatening and intimidating by a criminal street gang a Class 4 felony where it would otherwise be a Class 1 misdemeanor. By allowing an enhancement under §13-604(T), the defendant is being punished twice for the same conduct.

V. Conclusion

A.R.S. §13-604(T) creates many problems that the legislature failed to answer when drafting the statute. Unfortunately, until the higher courts answer these questions, defense attorneys will have to continue to address these issues on a case-by-case basis. Outlined above are several arguments which may be helpful to attorneys challenging the use of §13-604(T); no doubt there are many more. Good Luck!

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1. California Penal Code § 186.22(a), (e) and (f) read as follows:

> (a) Any person who **actively** participates in any criminal street gang with **knowledge** that its members engage in or have engaged in a **pattern of criminal gang activity**, and who willfully promotes, furthers, or assists in any felonious criminal conduct by members of that gang, shall be punished by imprisonment in a county jail for a period not to exceed one year, or by imprisonment in the state prison for 16 months, or 2 or 3 years.
>
> ...
>
> (e) As used in this chapter, 'pattern of criminal gang activity' means the commission, attempted commission, or solicitation of **two or more** of the following offenses, provided at least one of those offenses occurred **after the effective date** of this chapter and the last of those offenses occurred **within three years after a prior offense**, and the offenses are committed on separate occasions, or **by two or more persons**.
>
> ...
>
> (f) As used in this chapter, "criminal street gang" means any ongoing organization, association, or group of three or more persons, whether formal or informal, having as **one of its primary activities** the commission of one or more of the criminal acts enumerated in paragraphs (1) to (23), inclusive

of subdivision (e), having a common name or common identifying sign or symbol, and whose members individually or collectively engage in or have engaged in a **pattern** of criminal gang activity.

[Emphasis added to show differences with A.R.S. § 13-604(T).]

2. *See People v. Gamez*, 235 Cal.App.3d 957, 286 Cal.Rptr. 894 (Ct. App. 1991); *See also People v. Green*, 227 Cal.App.3d 692, 278 Cal.Rptr. 140 (Ct.App. 1991).

3. *State v. Jones*, 177 Ariz. 94, 97, 865 P.2d 138, 141 (1993).

4. *Smith v. Goguen*, 415 U.S. 566, 573, 94 S.Ct. 1242, 1247, 39 L.Ed.2d 605 (1974).

5. *See State v. Weinstein* 193 Ariz. Adv. R. 35, 36 (June 20, 1995)("Even if the conduct generating the criminal charge is not constitutionally protected and falls within the statute's legitimate scope, a defendant may challenge it on the basis of overbreadth 'if it is so drawn as to sweep within its ambit protected speech or expression of other persons not before the Court.'" (citing *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 933 (1975)).

6. *See State v. Jones*, 177 Ariz. 94, 98, 865 P.2d 138, 141 (1993)("It is not [] the role of police to determine arbitrarily what activities should be proscribed. That is the role of the legislative bodies, and the law should not depend on good human judgment."); *See also State v. Weinstein* 193 Ariz. Adv. R. 35, 37 (June 20, 1995)(In order to render a vague statute constitutional, the court would have to "read into it something that the legislature did not put there. Doing so would substitute [the court's] judgment for the legislature's with respect to what conduct should be prohibited. [The court's] role, however, is not to determine what acts should be crimes or 'wrongs;' that responsibility belongs solely to the legislature.")(citations omitted).

7. A.R.S. §13-604(P) states that "[t]he penalties prescribed by this section shall be substituted for the penalties otherwise authorized by law if the previous conviction, the dangerous nature of the felony or the allegation that the defendant committed a felony while released on bond or on his own recognizance as provided in subsections R of this section is charged in the indictment or information and admitted or found by the **trier of fact** . . . .[Emphasis added.]"

8. *See State v. Turner*, 141 Ariz. 470, 475, 687 P.2d 1225, 1230 (1984)(parole); *State v. McNair*, 141 Ariz. 475, 485; 687 P.2d 1230, 1240 (1984)(probation).

9. *See State v. Powers*, 154 Ariz. 291, 742 P.2d 792, 794 (1987)(Escape status used for enhancing sentence was question for jury since it involved criminal activity and mens rea). Ω

Special Actions

by Carol Carrigan,
Deputy Public Defender--Appeals Division

So the trial judge turned your motion down (again!) and you know that once this client is convicted he won't get relief in the appellate process (because, for example, he can't raise a remand issue or shouldn't have had this evidence introduced against him in the first place). Think: SPECIAL ACTION! This all too seldom-used procedure can be just what the doctor (not the judge) ordered. It is true that appellate courts jealously guard access by claiming jurisdictional constraint, but the court does have jurisdiction if you can show that your client will have no speedy and adequate relief by way of appeal. In addition, your evidentiary rule or statute may be so new that the appellate court is willing to resolve the question now rather than wait until numerous trial court constructions must be interpreted and conformed. Juvenile matters, in particular, face the problem of mootness should the question not be decided early on. Even where the issue is moot, the appellate court may take special action jurisdiction if similar situations may reoccur and continue to evade review. Other examples might be denial of your motion to withdraw due to a conflict of interest or denial of your first timely Rule 10.2 motion for change of judge.

This all too seldom-used procedure can be just what the doctor (not the judge) ordered.

What are the trial court advantages of taking a special action? Well, the obvious one is that you may very well win. But, in addition, it shows the trial court judge that you are serious about your issue, so serious that you will be presenting the appellate court with an immediate argument that the judge's ruling is wrong. (Many judges do not like to see their names in printed opinions which reverse their rulings.) In addition to the above, taking the special action forces you to organize your thoughts and arguments--merely doing so may help you to educate the trial judge and avoid the necessity of taking your case down the street.

Once the appellate court has accepted jurisdiction of your petition for special action and has granted your request for oral argument, you can look forward to arguing to a court which is focused on the legal issues. (Sometimes, in the trial court rush to hurry along the train, legal issues get short shrift.) Get your legal issue

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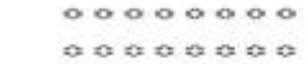
ducks in order and enjoy the opportunity of arguing to the appellate panel. (They may not agree with you, but they will listen to your oral argument.)

We often hear the complaint from trial lawyers that they'd like to do a special action on an issue but really don't know how. The good news is that the special action rules were amended in 1992 and provide that the petition shall be a single document containing four sections: 1) a jurisdictional statement, 2) a statement of the issues, 3) a statement of the facts material to consideration of the issues presented, and 4) the argument with respect to the issues with citations to authorities and statutes, and appropriate references to the record. All references to the record should be supported by an appendix. This is really a much simpler pleading than was required under the old rules. It looks very much like the Petition for Review which is filed after an adverse decision by the court of appeals except that the first section in a Petition for Review is not a jurisdictional statement but a summary of the court of appeals decision.

One other thing you should know about filing a petition for special action is that you must request a stay of proceedings in the trial court prior to filing your request for a stay in the appellate court. This request must be a separate pleading.

Still, you say, you are uncertain as to your ability to file the special action or write the petition in the proper form. Not to worry. If special action seems the way to go, visit the Appellate Division. There is always some appellate lawyer available who'll help you through the rough spots. Ω



AACJ

by Michael Terribile,
Private Defense Counsel in Phoenix,
State Bar Certified Specialist in Criminal Law, & former Maricopa County Deputy Public Defender

Every now and then I meet someone who practices criminal law here in Arizona but is not a member of AACJ (Arizona Attorneys for Criminal Justice). Being the indirect and subtle person that I am, I often ask them why they aren't members. To my disappointment, the reply is usually along the lines of asking, "What does AACJ do for me?"

They are asking the wrong question.

In its essence, AACJ is not about doing anything for lawyers. It is about promoting what we as criminal defense attorneys presumably believe in. It is about promoting what presumably motivates and drives us as criminal defense lawyers. It is about promoting a system of criminal justice that doesn't lose sight of the principles and values that the system was based on. It is about promoting a system of criminal justice that remains true to the Bill of Rights, to the presumption of innocence, to the burden of reasonable doubt, and to the promise of a fair trial and appropriate sentencing.

AACJ is about supporting and defending lawyers who put their energies to such tasks and who, from time to time, find themselves being threatened by overzealous prosecutors or misguided judges for their efforts.

AACJ is about trying to keep the system honest in the face of the "war on drugs," the fear of crime, prosecutorial misconduct and overreaching. It's about responding to the incessant drumbeat by unscrupulous politicians who pander to the public with false calls for law and order. It's about educating the public to the folly of taking for granted the civil rights and liberties which we have been so lucky to have inherited and which have been entrusted to us for future generations.

AACJ is about trying to get the lawmakers to consider a point of view other than that of the simplistic "lock 'em up and throw away the key" types, who never saw a law they liked less, or more often ignored, than the Bill of Rights. It's about giving a voice to the citizen who doesn't know it yet, but will, some time in the future, have more than a passing interest in seeing that the system is fair and capable of separating the innocent from the guilty.

AACJ is about being the conscience of the community. That means speaking out about inadequate funding for indigent defense, supporting those who take on the defense of capital cases, lobbying our state and federal legislators or holding candidate forums. It means placing people on state bar and other committees that have an impact on the system.

AACJ is about being a watch dog. It's about calling attention to unfair laws or procedures and trying to change them. It's about writing amicus briefs and being available to our brothers and sisters as a resource. It's about being willing to challenge judges, whether trial or appellate, to be the neutral and detached magistrates they are sworn to be and demanding of them the highest standards of practice.

AACJ is about lawyers promoting the virtue of justice outside, as well as inside, the court room.

The question is not "What does AACJ do for me?" The question is "What should AACJ be involved in next and how can I help?" Ω

Time Well Spent [But Easily Overlooked, Miscalculated or Forgotten]

By Edward F. McGee,
Deputy Public Defender--Appeals Division

In this day of presumptive sentencing, "truth-in-sentencing," mandatory sentencing and "flat time" sentencing, it often seems little can be done to aid the hapless soul presenting himself to the court for sanction once the charge bargain is struck or the jury has spoken. In the greater scheme, this is essentially true. There remains, however, one last little fillip, one final twist to the process, which can modify the final result: awarding credit for pre-sentence incarceration or "back time."

Often the back time award changes things by only a few days or weeks. In the extreme case, however, it can set a defendant entirely free. More commonly, it can advance a defendant's parole date on a string of consecutive sentences so that he can move more rapidly from a "flat time" number to a "soft time" commitment or from a higher security classification to a lower one or in other respects make his life in confinement more bearable. Whatever the result, it is the responsibility of counsel to secure this benefit for his client. Anecdotal experience, however, suggests that errors are made in one-third to one-half of all cases. It is the purpose of this article to identify the source of those errors for trial practitioners, to remind of the means available to correct them once they have occurred, and to suggest ways of avoiding them in future cases.

Anecdotal experience, however, suggests that errors are made in one-third to one-half of all cases.

The right to back time credit is statutory.[1] It exists in A.R.S. § 13-709(B). The precise operative language declares defendants under sentence shall receive credit "for all time actually spent in custody pursuant to an offense." These are simple words and one would think them susceptible to unerringly reliable application in every case. As we shall see, however, the process can be more complicated and less predictable than it appears.

1. Calculating Back Time Credit.

The fundamental back time calculus is simple: a defendant is entitled to credit for every day or part of a day spent in custody up until the day of his sentencing.[2] If he has been arrested ten times and posted bond within an hour on each of those ten occasions, he gets credit for ten days, even though he spent far less time than that in confinement. As simple as this rule sounds, it is susceptible to three limitations.

First, a defendant does not receive credit for the day of sentencing.[3] This is so, the courts have reasoned, because the day of sentencing is the day one's sentence commences, and allowing a back time credit for it would constitute a double counting. (Whether this conflicts with the full credit for partial day rule is a question for the reader to resolve.)

Secondly, the courts have held that the clock does not start running until a defendant is actually in a jail.[4] While most persons would find being handcuffed in the back of a squad car to constitute "custody," the Arizona Court of Appeals has read a "real jail" requirement into the statute. The formality of the booking process is apparently a necessary antecedent. Go figure.

Third, there is the problem of "allocation." *State v. Cuen*,[5] declares that a defendant receiving **consecutive** sentences is only entitled to have his back time apply once. If he has four counts and 100 days, he can have 25 days off the sentence on each count, or 100 days off the first count alone, or any combination of allowances, so long as the net total does not exceed 100 days.

The corollary to the allocation rule on consecutive sentences is that if a defendant receives **concurrent** sentences, he is entitled to all time served credit on each count (assuming he served the same amount of pre-sentence time on each count).[6] This the court cannot deny.

2. Making Sure Your Client Gets the Credit.

Now that we've mastered the mathematics of the process, it is time to put it into application. This should be simple, but long experience has shown that most mistakes occur here. This is so because lawyers succumb to the temptation to let the presentence investigator or the judge do the calculation for them. As it happens, counsel does his client a disservice if he defers to either of these officials to calculate the back time allowance.

Whatever their other virtues, pre-sentence investigators are humans with the math co-processor deleted--"SX" series persons, as it were. They routinely make computational errors. In addition, despite their

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"criminal justice" educational credentials,[7] they are **not** well acquainted with the law pertaining to back time calculation. Finally, by disposition, they are not inclined to give our clients any extra benefit if they can avoid or overlook it because, fundamentally, their relationship with our clients is competitive--they get scammed every day.

As for judges, case law **requires** that they actually make the back time credit calculation--or that at the very least, they not delegate it to the Department of Corrections.[8] While many judges may possess fine mathematical minds, it is unrealistic to expect that they can reliably perform instantaneous serial calculations for each of the twenty persons they send to prison every morning in the metropolitan courts of this state. Besides, they have pre-sentence investigators who are supposed to do this for them.

From all this, the criminal practitioner should conclude that back time calculation is something no one else in the system is likely to get right. The only way to make certain one's client is getting every day, week, month or year to which he is entitled is to perform the calculation oneself--and in doing this, one must be prepared to dispute the calculation in the pre-sentence report with the judge and the prosecution, if necessary.

Here is where the others most commonly blunder:

a. Errors in Addition.

Anyone who thinks an imaginary number can only be a multiple of the square root of minus one has never read a pre-sentence report. Pre-sentence investigators frequently goof in summing up multiple terms of pre-sentence incarceration. They usually get it right if it is in a single block, but defendants who have served several terms of pre-sentence incarceration are often the victims of computational errors. For some pre-sentence writers, two plus two does not reliably equal four. The effective lawyer always checks the math of the back time computation before allowing the court to sentence his client.

b. Failure to Identify All Periods of "Conventional" Pre-Sentence Incarceration.

This is the second most common error found in pre-sentence reports. It is also the error which usually cheats the defendant out of the most time. Most commonly, it is attributable to the failure of the investigator to recognize that a particular block of jail time applies to a particular count or cause number. This is an especially common error when a defendant has been on probation and picks up new charges (the so-called "Term One" situation). In this latter circumstance, there is no substitute for close examination of the court's own files, because defense files are not assembled in a manner likely to preserve proof of all back time credit, particularly where the defendant has enjoyed periods of pre-sentence release on the earlier charges or where he had counsel other than the public defender for some of his charges at their earlier stages.

While it may be necessary to delay sentencing proceedings in order to examine the court's files, in the case of multiple counts or charges, the benefit to the defendant can be considerable. Often these extra blocks of time can only be discovered by checking the arrest and bench warrant returns and the release orders against the values on the cover sheet of the pre-sentence report. If a defendant has multiple cause numbers and overlapping arrests and releases, it may be necessary to actually prepare a chart in order to keep it all straight.

c. Forgetting the Arrangement of the Calendar.

The next most common computational error stems from the failure of the pre-sentence investigator to remember which months have 31 days and which have 30. A calendar can help keep this straight, but most successful lawyers of the writer's acquaintance rely on the rhyme taught in grammar school.

d. Forgetting Leap Year.

Julius Caesar invented this device in 45 B.C., but the criminal courts have been slow to accept it. If you do not remember that your client gets credit for 29 days in February every fourth year no one else will. Defendants never, ever, get credit for it in pre-sentence reports. Please bear in mind that this year, 1996, is a Leap Year and it presents us with an extra day.

e. Forgetting or Not Knowing of *State v. Ritch* Time.

This is another one pre-sentence investigators never, ever, get, and with the number of transferred juveniles in our system it is important for the defense practitioner always to bear it in mind. *State v. Ritch*[9] holds that all time a juvenile spends in detention from arrest until transfer is "time actually spent in custody pursuant to an offense" for purposes of A.R.S. § 13-709(B), despite the fact juvenile proceedings are technically civil.

If counsel knows a juvenile is coming up for adult sentencing, it may be necessary to plan in advance, because adult pre-sentence reports routinely and mistakenly list the date of transfer as the date of arrest and base back time computations on that. If a juvenile is not taken into custody on the day of the offense and the pre-sentence report does not otherwise discuss the details of his eventual apprehension, counsel will need to get the arrest details from the police reports. If there is no police

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report fixing the date of the arrest, it may be necessary to obtain that information from the juvenile court transfer summary. This is so because the superior court file on a transferred juvenile will not contain the usual Initial Appearance Court documents setting release conditions or certifying the date of apprehension upon a warrant. Checking the transfer summary or other documents for proof of arrest date is important because the time a juvenile spends awaiting transfer can be considerable, especially on homicides or other serious charges. The defendant in *Ritch*, for example, eventually received credit for an additional 169 days.

f. Neglecting to Identify or Award Credit for Time Spent in Custody out of State.

Another lump of back time routinely overlooked is the period a client spends in out-of-state custody awaiting extradition or transfer to Arizona under the Interstate Agreement on Detainers (the "IAD").[10] Under either sort of transfer, the back time clock does not begin to run until any charges pending in the foreign jurisdiction have been reduced to a final sentence or dismissed.[11]

Given the state of today's society, one cynic recently observed that because back time is so important, our clients should arrange to be born in prison, if possible.

In the case of extradition, many defendants have no charges in the sanctuary jurisdiction. These defendants get credit for every day from the moment of arrest in the foreign locale. This is so regardless of whether the defendant fights extradition to Arizona.[12]

Defendants proceeding under the IAD, on the other hand, by definition, necessarily have had charges pending in the foreign jurisdiction at some point in time. If a defendant seeking IAD transfer has served notice in the prescribed form on the holding jurisdiction, but has not yet concluded his legal business there, the Arizona clock does not start until he has been sentenced to prison or a final jail term or has had his charges dismissed in the foreign venue. If an IAD applicant has concluded his holding state charges before he serves their authorities with notice, the Arizona clock runs from the date of the service of the notice. In either case, inaction or delay by Arizona authorities in retrieving an IAD applicant does not toll the time.[13] Similarly, a defendant receiving credit against a foreign sentence while awaiting trial in Arizona on Arizona charges is entitled to credit for all time spent in custody after he is first available to the Arizona authorities for transportation to this state.[14]

g. Neglecting to Transfer Credit from Counts Reversed or Dismissed on Appeal to Counts Surviving Appeal.

Switching credit on resentencing following a partial success on appeal is another source of back time easily overlooked, but here counsel is likely to have a reminder--the defendant himself. The client who has been locked up long enough to survive an appeal is not likely to be ignorant of his back time rights--in fact, some of these guys could qualify for a Ph.D. on the subject. Their biggest problem in claiming this credit will likely be their limited credibility with the probation department and the court. Here is another place where a knowledgeable lawyer can make a difference.

Counsel handling the case of a defendant who had back time allocated among a series of consecutive sentences must be alert to the fact that if any of these counts are dismissed on appeal or reversed and not re-prosecuted, the defendant is entitled to have the back time awards on the dismissed counts transferred to the remaining counts.[15]

A variation on this situation occurs when a defendant originally sentenced to death (for which no back time credits are allowable) is convicted on retrial of a lesser offense. In this situation, the court must award full back time credit.[16]

In recent years, denial of back time has not been a problem for persons sentenced to life in prison. This is so because *State v. Thomas*,[17] holds that defendants committing their crimes after October 1, 1978, are entitled to back time against their parole eligibility, even if not against their sentences. Presumably this was not so under the former law where a life sentence was "life without parole."[18] Whether the courts will allow back time credits against the "natural life" sentences available since July 17, 1993, under A.R.S. § 13-703(A) has yet to be determined.

Because a defendant may spend years or even decades awaiting final appellate or post-conviction relief, re-assigned pre-sentence credit can set him free, even when the sentence on the remaining charges is lengthy itself. And, even if it doesn't produce immediate freedom, if it reduces a client's remaining prison time for a violent offense to less than ten calendar years, under present prison policy, it will make him eligible for

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confinement other than in the Central Unit. A lot of inmates think this a desirable result.

b. The Special Case of DWI Back Time.

Ever since the 1982 legislative amendments, felony DWI has been neither fish nor fowl in the sense that it is the only felony offense for which courts can sentence defendants to prison as a condition of probation. This indeterminate quality also applies to back time credit against such probationary prison terms. Under *State v. Mathieu*,[19] a DWI defendant sentenced to prison as a condition of probation is entitled to back time--unless he is also sentenced to jail as a condition of that same probation. In this latter case, *State v. Schumann*,[20] gives the court discretion to allocate the pre-sentence credit to the jail term, if it chooses. The one thing courts do not appear free to do in sentencing the DWI defendant is ignore the back time altogether. If the judge doesn't award the credit against the jail term, he must award it against the prison term.

This list of potential pre-sentence credit errors is by no means exhaustive and others are sure to present themselves during practice. Nevertheless, by pointing out those which commonly occur, the writer hopes to encourage counsel to be alert to the general risk that our clients can easily be shortchanged. If lawyers are routinely alert to this risk, they will likely discover other abuses of the right to back time not identified in this article.

3. Things not Qualifying for Back Time Credit.

In order more fully to identify situations calling for back time, it may be helpful to catalog those situations in which a defendant cannot qualify for credit. Those cases include the following:

a. "Street Time" Spent on Probation, Parole or Supervised Pre-trial Release.

Here the courts hold to the basic requirement of "jail equivalency." *State v. Vasquez*,[21] declares defendants are not entitled to pre-sentence incarceration credit for "street time" spent on probation, parole or supervised pre-trial release.

b. Time Spent in Drug Treatment as a Condition of Probation.

Analytically, this was a tougher question for the courts than the "street time" issue discussed above. In *State v. Reynolds*,[22] the court of appeals initially held that in-patient drug treatment programs satisfied the "custody" requirement of A.R.S. § 13-709(B). The Arizona Supreme Court vacated that decision, however, and in the opinion cited above declared, as always, that "custody" means jail or prison, and only that.

c. Time Served Prior to Imposition of Jail as a Condition of Probation.

Here, in a departure from the dominant logic, it would appear that custody does not mean "jail." A closer reading of *State v. Harney*,[23] however, suggests that non-enforceability of back time credit against jail imposed as a condition of probation stems not from the definition of "custody," but instead from the definition of "sentence." Because cases since Methuselah hold that probation is not a sentence, but a feature of the suspension of sentence, it logically follows that a defendant has no right to pre-sentence credit where the court suspends sentence.

4. Correcting Back Time Errors.

The most efficient methods for correcting back time errors vary with the type of errors. The following is a list of suggestions for the errors most commonly encountered:

a. Clerical Errors.

Clerical errors, or those made by the clerk of the court in preparing the sentencing minute entry, are the simplest to correct. Rule 24.4 of the Arizona Rules of Criminal Procedure permits the correction of clerical errors, upon application and notice, at any time. Because the sentencing minute entry is what governs an inmate's time, release and classification calculations by the Department of Corrections, it is essential that it be scrupulously accurate. If it contains errors they will go undetected unless counsel complains of them, because, contrary to common superstition, the Department of Corrections does not receive copies of the sentencing transcripts, even for defendants who go to trial and appeal. Because the sentencing minute entry is the single most important document in an inmate's life, counsel has an absolute ethical duty to read it when it arrives and check it against his memory and his client's case log to make certain it is correct in every respect including the back time allowance.

b. Non-Clerical Errors.

Regrettably, most back time errors are not clerical. For these errors, the approaches differ, depending on the age of the error upon discovery.

Rule 24.3 allows for "Modification" of any unlawful sentence or sentence imposed in an unlawful manner within 60 days of imposition of sentence. A sentence not allowing a defendant proper back time credit is one imposed in an unlawful manner because A.R.S. § 13-709(B) mandates back time credit. Any lawyer discovering a back time defect or any other sentencing flaw within 60 days of sentencing should immediately file a Rule 24.3 motion seeking to correct the error. Omitting to do this and leaving it to the defendant or appellate or post-conviction counsel exposes the defendant to the very

real likelihood the error will go completely undetected. Even if it is detected, if the 60 days have already run when the next lawyer gets the case, the opportunity for a quick fix (and possible early release or more favorable security classification) is squandered. The simplest appeals now require a year to resolve, and many Rule 32 applications are just as slow. Many defendants will have completed their terms before these remedies can help them. This is a big enough problem for the defendant who appeals or files a Rule 32 notice; for the defendant who quietly serves his number without seeking post-conviction relief, the error will likely forever go undetected.

The other remedies for back time and other sentencing errors have already been alluded to above. For a defendant over the 60-day limit of Rule 24.3, a Rule 32 application or a direct appeal may be the only avenue of relief. In these circumstances, trial counsel should be certain to notify successor counsel of any sentencing errors which come to his or her attention. In even this, however, there is one final caveat: if trial counsel discovers his client is still confined after his correct release date has passed, he must take steps to start a habeas corpus petition, either by filing it himself or by alerting his supervisor or appellate counsel or successor counsel or someone capable of getting the job done.[24] Standing idly by while a client serves more time than the court could lawfully impose is all but a crime itself. Certainly, it is unethical conduct and malpractice.

The extra day a client spends in prison because of such an error may be the day he is "shanked," or his child is born.

5. Planning in Order to Maximize Back Time Credit.

Given the state of today's society, one cynic recently observed that because back time is so important, our clients should arrange to be born in prison, if possible. While we can't help them with this, except perhaps by the deft handling of their mother's cases, there still are things we can do in advance to make certain our clients receive the maximum benefit from this right.

a. Avoid Consecutive Sentencing, if That Is a Viable Plea Bargaining Option.

As noted in section 1 above, one must be alert to the problem of "allocation." For any defendant with a back time accumulation, concurrent sentences are always better than consecutive sentences, even when the theoretical release date is the same, because with consecutive sentences there is always the risk of vengeful allocation of all back time to the final sentence and because a defendant's advance (for crimes committed after August 3, 1984) from one sentence to the next is always discretionary.

By way of illustration, consider for a moment the case of a hypothetical post-1993 defendant with a year of back time who has the choice between five consecutive two-year sentences or two concurrent ten- year sentences. If the court allocates all the back time to the final two year sentence in the consecutive example, and if the defendant earns no early advance from one sentence to the next, he will have to serve the first eight years flat and 85% of the one year he owes on the final sentence for a total commitment of 8 years, 10.2 months. If, on the other hand, he chooses the concurrent plan, the defendant doesn't need to advance from one sentence to the next. If he experiences no "good time" forfeitures, he will have to serve 85% of 9 years or a total of 7 years, 6.6 months. The advantages accruing to a pre-1994 defendant are even greater.

b. If Consecutive Sentencing is Inevitable, Request All Back Time Be Allocated to the First Sentence.

This is a corollary to the rule declaring a preference for concurrent sentences. If consecutive sentences are inevitable, the next most desirable result is to advance as rapidly as possible from one sentence to the next. If back time is divided up among each of several sentences, or if, worse yet, it is all allocated to the final sentence, advance from sentence to sentence is retarded. The most desirable course therefore, in a series of consecutive sentences, is to request that all back time be allocated to the first sentence, and if that sentence is thereby extinguished, the remainder to the next sentence and so on.

c. If a Client Is on Bail or Recognizance Release On Some Charges, but Jailed on Others, Surrender Him on All Charges Immediately.

Because A.R.S. § 13-709(B) only allows back time credit for time "actually spent in custody pursuant to an offense," it stands to reason that a defendant who is on release on some charges will not receive pre-sentence incarceration credit on those charges, even if he is in jail on other charges. Whenever a defendant is confined on multiple counts or multiple cause numbers, it is absolutely imperative that counsel immediately search the record to make certain he has been surrendered on any outstanding bond or recognizance release--otherwise the clock will never start running as to the charges on which the defendant is released. Negligent counsel can literally cost a defendant years if this is not done. This situation most

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commonly occurs when a defendant commits new crimes while on bail or recognizance release on other charges.[25] It happens particularly frequently where the bail or recognizance release pertains to a case handled by one lawyer and the later case is handled by another, particularly from another firm.

6. Conclusion.

Back time errors are a frequent occurrence in criminal practice, and they are more than a mere annoyance, because the criminal defendant is absolutely entitled to credit for every day he serves prior to sentencing. The extra day a client spends in prison because of such an error may be the day he is "shanked," or his child is born. Because criminal defense practice is so much an exercise in damage control, those who undertake it should always exercise care to be certain their clients do not experience back time "damage" when it is so easily preventable.

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1. The constitutional underpinning is weak. Essentially, it rests on the equal protection principle implicated when a wealthy man on bond release and a poor man unable to post bail are sent to prison under otherwise identical circumstances. In this eventuality, if the poor man receives no back time credit, he actually spends more time in custody than the rich man. To prevent this injustice, the courts have recognized that the poor man is constitutionally entitled to all of his back time--but only if he receives a maximum sentence! For reasons explained in the text, this has not been a problem for defendants committing crimes in Arizona after October 1, 1978. Nevertheless, those readers wishing a fuller explication of the constitutional right to back time may wish to consult *State v. Sutton*, 21 Ariz. App. 550, 521 P.2d 1008 (1974).

2. *State v. Carnegie*, 174 Ariz. 452, 850 P.2d 690 (App. 1993).

3. *State v. Hamilton*, 153 Ariz. 244, 735 P.2d 854 (App. 1987); *State v. Lopez*, 153 Ariz. 285, 736 P.2d 369 (1987).

4. *State v. Cereceres*, 166 Ariz. 14, 800 P.2d 1 (App. 1990).

5. 158 Ariz. 86, 761 P.2d 160 (App. 1988).

6. *State v. Cruz-Mata*, 138 Ariz. 370, 674 P.2d 1368 (1983).

7. Those of us long in the tooth remember when, in a less euphemistic time, this course of study was called "police science." Perhaps this is the source of the present difficulty.

8. *State v. Nieto*, 170 Ariz. 18, 821 P.2d 285 (App. 1991).

9. 160 Ariz. 495, 774 P.2d 234 (1989).

10. A.R.S. § 31-481, *et seq.*

11. *State v. Lalonde*, 156 Ariz. 318, 751 P.2d 798 (App. 1987); *State v. Horrisberger*, 133 Ariz. 569, 653 P.2d 26 (App. 1982).

12. *State v. Mahler*, 128 Ariz. 429, 626 P.2d 593 (1981).

13. *Horrisberger, supra.*

14. *State v. McClintic*, 160 Ariz. 525, 774 P.2d 829 (App. 1989).

15. *State v. Bravo*, 171 Ariz. 132, 829 P.2d 322 (App. 1991).

16. *Tittle v. State*, 169 Ariz. 8, 816 P.2d 867 (App. 1991).

17. 133 Ariz. 533, 652 P.2d 1380 (1982).

18. *See, Escalanti v. Department of Corrections*, 174 Ariz. 526, 851 P.2d 151 (App. 1993).

19. 165 Ariz. 20, 795 P.2d 1303 (App. 1990).

20. 173 Ariz. 642, 845 P.2d 1137 (App. 1993).

21. 153 Ariz. 320, 736 P.2d 803 (App. 1987).

22. 170 Ariz. 233, 823 P.2d 681 (1992).

23. 128 Ariz. 355, 625 P.2d 944 (App. 1981).

24. Habeas corpus is available under the procedures outlined in A.R.S. § 13-4121, *et seq.*

25. An example of this sort of fiasco appears in *State v. San Miguel*, 132 Ariz. 57, 643 P.2d 1027 (App. 1982). Ω

Follow Up--Postscript

by Helene Abrams,
Juvenile Division Chief

Last month I reported about the recent appellate victories in juvenile court. This month we have great news to report on two of those cases.

Through the incredible teamwork of Shellie Smith, Susan White, Mike Hruby, and Pam Davis, our client, who was remanded to juvenile court on a murder first degree charge, was **not** transferred back to adult court. To the best of my knowledge, this has never happened in our office, especially on a first degree murder charge. The dedication and cooperation of all the members of our office who participated in this case made this result possible. Congratulations to all!

We also learned that the disorderly conduct case discussed last month is now a published opinion. One cannot disturb the peace of another who is not at peace is now "the law" in Arizona. Congrats again to David and Ellen Katz. Ω

Forensics Today--Automated Fingerprint Identification System

by David C. Moller, Sr., Lead Investigator

Automated Fingerprint Identification System, or AFIS: what is it, and how does it work?

In the last few years you may have heard of AFIS, or computerized fingerprint searches. Many agencies within Maricopa County as well as Arizona are now hooked up to a statewide computerized system which is able to compare unidentified latent prints obtained from crime scenes to known, ink-rolled prints that have been stored in the system.

In the past, prior to AFIS, if an agency wanted to conduct a comparison of an unidentified latent print, it would need to have the name of a potential suspect. This name was often furnished by a victim, witness, or other evidence which linked the subject to the area from which the print was lifted. Absent the name, sometimes a cold search was conducted, which is when an examiner manually hand searches the latent print against thousands of stored, ink-rolled prints on file, one print at a time. This is a very tedious task, which could in fact take years without producing results.

The AFIS system contains fingerprints of those who have been arrested and printed, which have subsequently been encoded by an AFIS terminal operator and entered into the computer's storage database.

The terminal operator should be familiar and knowledgeable concerning fingerprints. In order to be a certified Arizona AFIS terminal operator, the operator must satisfactorily pass a test to be authorized to perform ten print (ink print) or latent print operator functions. Certification in the latent print level authorizes the operator to perform both the ten print and latent print levels.

These prints are entered into the computer by using a digitized mapping process. The prints are classified and entered using its center (or "core") and the breaks and splits (bifurcations, ending ridges, etc.) in the print's ridges, which are called "minutia." The computer refines the fingerprint on a high-density pixel color screen, and marks the breaks and splits in the ridges with symbols.

When a latent print is introduced to find a match, the computer initiates a high speed search of the minutia's marking symbols of the latent print to the minutia's marking symbols of the previously stored known prints in the database, looking for a "hit." The system produces a candidate list of the top ten "hits," or subjects who have a print with similar characteristics to the print being searched. The computer ranks the candidates in order of probability. Frequently, the first choice is the right one.

The "hits" or the candidate's list is considered to be only an investigative lead. At this time, the names on the list are not considered suspects. A fully qualified, trained fingerprint examiner then manually examines the original latent print to the original ink-rolled prints of the identified candidates to determine if there is an actual match.

Latent prints cannot be identified unless a print is on file with the computer's storage database. Once the latent print is entered into the system, the computer will automatically compare any new inked prints added later into the database.

AFIS cannot search for finger joints or the palms of hands with the present technology. Latent prints do not require to have present the areas known as deltas and cores in order to be entered into the system.

The present law enforcement agencies in Maricopa County with AFIS capabilities are Arizona Department of Public Safety, Maricopa County Sheriff, Phoenix Police Department, Mesa Police Department, Scottsdale Police Department, Glendale Police Department, and Tempe Police Department.

The AFIS system has other useful purposes. For example, some states and federal agencies are using it or considering its use to prevent frauds by individuals who are attempting to obtain multiple driver's licenses, social security cards and/or benefits, passports, voter ID cards, and welfare benefits; to fraudulently cash checks; and to immigrate illegally.

It is presently in the works for state and local AFIS systems to become linked up with an FBI national system. Subjects who provide false names at the time of arrest to avoid apprehension on out-of-state warrants will be quickly identified. Submitted latent prints will be compared to the FBI's central data base which will contain all subjects whose ink-rolled prints have previously been submitted from other states and jurisdictions. When connected to the FBI's national system, local agencies will have access to the more than 30 million inked fingerprint cards now on file. Ω

Top 10
Public Defender Movies

by Nora Greer, Deputy Public Defender

At the risk of being presumptuous, I have decided to list the top 10 Public Defender movies. To qualify, the movie must feature either public defenders or private defense lawyers. It must be a movie that I have seen. My tastes may appear low brow and commercial. There are no foreign films on the list. The movies should try to show criminal justice in an honest fashion. There are no T.V. movies; to include them would expand the field too far.

The most important consideration for inclusion on the list is that the movie must depict the life of the public defender or the ideals we strive to uphold. These movies should examine dilemmas we face everyday. The trial scenes should show a sense of reality. Does this movie make you think about what you are doing? How do you conduct your life, your practice?

These are highly personal choices. This list is presented in hopes of sparking discussion and finding new candidates for the list. I am not the final arbiter on this matter.

1. ***True Believer***:

This movie concerns the redemption of a criminal lawyer (James Woods) from indifference, laziness, and marijuana by his young assistant. James Woods used to be a true believer. He lost his faith and spends a lot of his time doing badly in court and smoking marijuana in his office. Robert Downey Jr. portrays his eager associate. Downey urges Woods to take on the case of a man accused of committing homicide in prison. Through this work, both men become "true believers." They come to care enough to work hard for the client and defend him to the best of their ability.

2. ***Suspect***:

Cher is believable as a public defender in Washington D.C. She drives a Chevette. She and her co-workers look real. Unfortunately the plot is not real. Cher defends a homeless man who is charged with a homicide of a young woman. She continues to investigate the case during trial with one of the jurors (Dennis Quaid). The screenwriter never heard of jury tampering. If you can put the ludicrousness of the plot aside, it is a pretty good movie. The supporting cast is great: John Mahoney, Liam Neeson, and Joe Mantegna. While the screenwriter spent some time in the Public Defender's Office and he didn't understand the rules of court, the movie is still worth seeing.

3. ***And Justice for All***:

I saw this movie right before I entered law school and it made an impression on me. Now, I do not think as highly of it as I used to. My main problem is the high level of exaggeration. But if you want a truly black legal comedy, here it is. Crazy judges, clients locked up for busted traffic lights, and the defendant eating the evidence are highlights.

4. ***The Wrong Man***:

This is an Alfred Hitchcock movie from the 1950's which has not received a lot of attention. The movie is based on a true story with Henry Fonda as a musician wrongfully convicted of robbery. The movie shows how the man is wrongfully convicted, sent to prison, and then exonerated. It also accurately portrays the toll of prosecution on the defendant's family.

5. ***Presumed Innocent***:

This may not be a true public defender movie. The protagonist is a career prosecutor. However, this movie belongs on the list due to the great cross-examination scene. The cross of the pathologist by Raul Julia is what every trial attorney dreams of doing at least once in their career. I also like this movie because it touches on corruption in the police and prosecutorial ranks.

6. ***Bananas***:

I include this movie merely for the trial scene. Woody Allen represents himself in trial. The cross-examination of himself, by himself, is a classic.

7. ***Anatomy of a Murder***:

Jimmy Stewart defends Ben Gazarra, an Army officer who murders the man he thought raped his wife. The most memorable part is the way Stewart suggests a mental state defense to Gazarra in their first meeting. While this is a "no-no," it is still great to watch. The supporting cast is remarkable: Arthur O'Connell, Lee Remick, and George C. Scott as a prosecutor. Duke Ellington turns up as a musician in a road house. This movie shows up a lot on TNT.

8. ***Cape Fear*** (Version 2):

I pick version 2, directed by Martin Scorsese, with Robert DeNiro and Nick Nolte, because this one focuses on the behavior of the defense attorney. This movie touches on a public defender's worst nightmare. The client comes back for revenge on his attorney. The attorney has no defense because he deliberately mishandled the case.

The legal aspects of the plot are shaky. I have never heard of a "chastity report." The screenwriters

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have never heard of Rule 404. But the movie holds the moral high ground. The lawyer failed to act as an advocate for his client and must suffer the consequences. The movie is a warning.

10. ***To Kill a Mockingbird***:

The old standby. This movie has caused more people to go to law school than any other. Atticus Finch is the model of an all-around great human being, model parent, model attorney, and a model citizen.

11. ***My Cousin Vinny***:

Another movie that shows what you should not be doing. Austin Pendelton plays the public defender who gives up on his client while good old Vinny the street lawyer leads the way. It is fun to watch Vinny. He tries very hard and that's what you should be doing too. Ω

Arizona Advance Reports

Volume 200

State v. Krum, 200 Ariz. Adv. Rep. 3 (1995)
Trial Judge Gregory H. Martin
Trial Court Affirmed, Court of Appeals Reversed

Krum pled no contest to attempted sexual abuse of his granddaughter. After losing his direct appeal, Krum filed a motion for post conviction relief, claiming that the victim had recanted. Krum then petitioned for review of the petition's denial, claiming that his appointed post-conviction counsel was ineffective for failing to obtain and submit an affidavit from Krum's wife corroborating the recantation. Krum then filed a second Rule 32 petition, including third party affidavits from his wife and grandson that the victim had recanted, and renewed his argument that counsel was ineffective in the first Rule 32 petition.

The trial court rejected the effectiveness claim, holding that there is no constitutional right to counsel in PCR proceedings. The trial court went on to rule on the substantive claim, and held counsel was not ineffective because the affidavits did not establish a colorable claim that the victim had recanted.

The court of appeals reversed, holding that the statutory right to counsel in the first Rule 32 proceeding under former A.R.S. §13-4235(B) and §13-4234(C) includes the rights to effective assistance. The court also ruled that Krum's affidavits would have entitled him to an evidentiary hearing on his new evidence claim under *State v. Wagstaff*, 161 Ariz. 66, 111-12, 893 P.2d 759, 762-63 (App.1995).

The supreme court declined to decide whether the right to counsel in a Rule 32 includes a right to effective assistance, noting that the legislature has eliminated the right to appointed counsel in post-conviction proceedings under A.R.S. §13-4234(C). The court held that because the trial court ruled on the merits of the new evidence in Krum's second Rule 32, his claim regarding the deficiencies of his first Rule 32 counsel is not relevant.

The court then held that the third party affidavits filed by Krum were not sufficient to entitle him to an evidentiary hearing on the merits of his post-conviction claim. The court stated that the test in these cases is whether Krum's affidavits plausibly show that the victim may have recanted, and if so, whether that fact probably would have entitled Krum to relief.

The court noted that the credibility of recanted testimony is best left to trial courts, and agreed with it that the affidavits were insufficient because neither of the affiants claim to have directly heard the victim recant. The court further held that there was other evidence in the record to corroborate that the abuse occurred, including Krum's no contest plea.

State v. Orantez, 200 Ariz. Adv. Rep. 7 (1995)
Trial Judge Frank Dawley
Reversed and Remanded

The defendant was convicted of sexual assault and kidnapping. In statements to the police, the victim claimed to have been abducted from her home. At trial, she claimed to have been abducted from the parking lot of the bar. On the second day of trial, the prosecutor learned and disclosed that the victim was enrolled in a methadone treatment program due to a ten-year heroin addiction. At a hearing with the jury absent, the victim denied using cocaine or any other drug on the date of the incident. Based on her testimony, the trial judge precluded defendant from asking the victim about her drug use. The victim was the state's only witness. The defendant was convicted.

After trial, the court allowed the defendant access to the victim's methadone treatment records. The

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defendant then filed a motion to set aside the verdict, raising as newly discovered evidence the victim's history of lying to the police and lawyers on other matters, her drug abuse and denial of drug abuse at trial, and evidence of prostitution to support defendant's alternate theory of consent.

Defendant presented evidence that the victim had tested positive for cocaine, metabolites of cocaine, and morphine (which indicates use of heroin, codeine or morphine). The tests indicated use sometime after 10:00 pm. The assault occurred between midnight and 1:00 am.

The defendant also presented evidence that the victim had admitted to a counselor less than two weeks after the alleged incident that she was using heroin and engaging in prostitution to support her habit.

The trial court denied the motion to vacate the judgment, ruling that the new evidence would not have changed the verdict. The court of appeals affirmed.

The supreme court reversed and remanded. The court held that the victim's drug use was material evidence, as it is material to her credibility as the state's key witness.

The court also held that the new evidence was not cumulative, even though the jury already had evidence of the victim's lack of truthfulness regarding her shifting version of the abduction. The court stated that although perjurious testimony does not automatically result in a new trial, in this case the victim lied about drug use at the exact time of the incident.

The court held that the new evidence is not merely impeaching, because if the jury had known of her drug use within hours of the alleged incident, the defendant could have argued more persuasively that her ability to perceive, remember, and relate was inhibited by the drug use. The court held that the new evidence regarding drug use would probably have changed the verdict at trial, because the victim was the only witness to the alleged crime.

Finally, the court held that the new evidence regarding the victim's prostitution, while not generally admissible, may be relevant in relationship to her drug use. It directed the trial court, on remand, to determine the relevance of this new evidence.

State v. Williams, 200 Ariz. Adv. Rep. 11 (1995)
Trial Judge Robert R. Bean
Affirmed

The defendant was accused of murdering his former girlfriend, Rita. At 3 a.m. on the day she was killed, Rita came to the defendant's apartment. They had an argument, and she confronted him with a gun. He knocked her down and disarmed her, and went into the apartment which he shared with his current girlfriend, Michelle. Defendant left the apartment, and did not return until 7 a.m.

Three weeks later, defendant admitted to Michelle that he had killed Rita. Rita had been severely beaten and shot, and then run over several times by a car. Defendant told Michelle that he would kill her, too, if she told anyone.

Five weeks later, defendant went to a Circle K, where an acquaintance, Norma, worked. Defendant had a gun, and accused Norma of spreading rumors that he had killed Rita. He asked her for the money in the register. Norma handed over the money, but when she refused to leave with him, he shot, hitting her in the forehead, abdomen, and left hand.

The defendant was charged with first degree murder of Rita, and with attempted first degree murder and armed robbery of Norma. The two cases were consolidated for trial, and the jury found the defendant guilty of all three offenses.

The trial issues on appeal are: (1) whether the trial court erred by consolidating the two cases for trial; (2) whether the trial court should have excluded evidence of defendant's prior bad acts against the victim in the murder case; (3) whether the trial court should have granted a mistrial after a state's witness testified concerning defendant's prior bad acts because the state did not disclose that she would so testify; (4) whether preindictment delay denied defendant his right to a speedy trial or due process; (5) whether the trial court erred by allowing the state two investigative witnesses; and (6) whether the trial court should have allowed into evidence an out-of-court statement by defendant as a prior consistent statement.

The court ruled on these issues as follows:

1. The court held that the cases were properly consolidated as they were "otherwise connected" within the meaning of Rule 13.3(a)(2). The court found that most of the evidence admissible in proof of the first offense was also admissible in proof of the second one.

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The evidence of the crime against Norma, the attempted murder victim, showed the defendant's consciousness of guilt by way of his desire to conceal the crime. The court stated in dicta that the evidence was also relevant because it furnished motive for the attempted murder.

The evidence of the armed robbery was relevant in the murder case because it supported the version of the crime given in the testimony of the state's witness, Michelle. Such evidence is admissible even if it refers to a defendant's prior bad acts.

2. The court held that the evidence that the defendant had on separate earlier occasions burned Rita's car, slashed her tires, and shot at her apartment. The court found that they showed defendant's animosity toward Rita, and thus were properly admitted to prove motive and intent. The court also held that the evidence was not unfairly prejudicial, as they were neither "horrifying" nor "disgusting," as the defendant urged on appeal.

3. On appeal, the defendant argued that the state violated Rule 15.1 because it did not disclose its intention to introduce prior bad acts testimony through Michelle. The court held that Rule 15 does not require the state to explain in its disclosure how it intends to use each of its witnesses.

4. The defendant argued that he was denied due process by the preindictment delay of nine months in this case. The court disagreed, holding that the defendant had failed to show that the state delayed to gain a tactical advantage, or that he had been prejudiced by the delay.

5. The trial court had allowed the lead detective from each of the two cases to sit at the prosecution table during the trial. The defendant argued that this violated Rule 615 of the Rules of Evidence, which allows "a person" whose presence is essential to remain. The court disagreed, holding that the rule was intended to mean "any person" and not just one person.

6. At trial, a defense witness testified that he had spoken with the defendant about the burning of Rita's car. When the defense counsel asked, "What did [the defendant] tell you?" about this, the state objected on hearsay. Defense counsel argued that the statement was admissible, as it went to show the defendant's state of mind. The objection was sustained. On appeal, the defendant argued that the trial court should have allowed the out-of-court statement as a prior consistent statement. The court disagreed, holding that defendant had waived this argument by failing to raise it below.

The sentencing issues on appeal are: (1) whether the trial court should have authorized funds for a presentence diagnostic mental health examination; (2) whether the trial court properly imposed the death sentence; (3) whether the victims' recommendations on sentencing violated defendant's constitutional rights; and (4) whether Arizona's death penalty is constitutional.

The court ruled as follows:

1. Before sentencing, the defendant requested that the court appoint a physician to assist in exploring mitigating circumstances. Defendant based his request on the state's witness's testimony that defendant had told her he had used drugs before the murder of Rita. The trial court denied the request.

The supreme court stated that although a trial court should exercise its discretion in favor of an examination, there was no abuse of discretion here in failing to do so. The court held that the record here showed that the defendant's mental health was not raised as an issue during trial, and that defendant had in fact denied using drugs throughout the entire trial and at sentencing. The court also noted that his attorney had not raised an insanity defense or requested a Rule 11 evaluation.

2. In reviewing the imposition of the death penalty, the court found that the defendant's conviction for the armed robbery of Norma was an aggravating factor in the death sentence for the murder of Rita. The court held that the trial court should not have relied on the conviction for attempted murder of Norma, because an "attempt" does not necessarily "involve the use or threat of violence on another person" required under A.R.S. §13-703(F)(2). The court stated that this was "immaterial," as the armed robbery conviction separately supported the (F)(2) finding.

The court stated that the trial court did not improperly rely on the above convictions regarding Norma as "prior" convictions, even though the defendant was convicted of these charges simultaneous to his murder conviction. The court held that such evidence is relevant to a defendant's character, whether the acts occurred before or after the murder.

The court found that the evidence supported the trial court's ruling that the murder was committed in a heinous and depraved manner.

3. The presentence report in this case indicated that Rita's father wanted the defendant sentenced to death. Norma also filed a statement recommending the death penalty. The trial court also allowed her to appear at sentencing, stating that if the defendant didn't get death, he should at least get life in prison. The defendant challenged the relevancy of the statements, but did not raise any constitutional challenge to them.

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The court acknowledged that a victim's recommendation on sentencing is relevant, but went on to state: "we have in the past assumed that the trial judge in a capital case is capable of focusing on the relevant sentencing factors and setting aside the irrelevant, inflammatory and emotional factors."

In a specially concurring opinion, Chief Justice Feldman noted that victim's testimony at sentencing in capital cases is "forbidden." Feldman states that while the court noted that there is no evidence that the trial judge considered or gave any weight to the victim's recommendations,

> It is also true, however, that the record does not indicate that the trial judge did not give any weight to the evidence. The record is silent. We have presumed that trial judges will ignore such testimony, but one must wonder how accurate such an assumption may be. The sentencing decision in many capital cases is difficult enough without subjecting the trial judge to the emotional pressure of listening to the victim's understandable but legally inadmissible recommendations, often motivated by the need for catharsis. These must come from other sources. . . I believe the time is near for the court to take a position forbidding the introduction of evidence calculated to influence the sentencing judge in a manner forbidden by law. It should not be offered by the prosecution or permitted by the court.

4. The court rejected the defendant's two arguments that Arizona's death penalty scheme (1) fails to narrow the class of persons eligible for death and fails to provide guidance to the sentencing court, and (2) violates evolving standards of decency in the world community.

State v. Superior Court, Maricopa County, 200 Ariz. Adv. Rep. 31 (1995)
Trial Judge Susan R. Bolton
Reversed

Patrick Cunningham struck a car driven by Peter Munjas by failing to yield the right-of-way. At the time of the accident, Cunningham's license was suspended and revoked. He was charged with one count of aggravated DUI. During discovery, Cunningham's lawyer requested an interview of Munjas, who refused pursuant to the Victims' Bill of Rights, A.R.S. §13-4433. The trial court granted Cunningham's motion to depose Munjas, finding that because he was not a crime victim, he could not refuse a defense interview. The state filed a special action and a request for stay of this decision.

The sole issue on appeal is whether the trial court abused her discretion in ruling that a person suffering property damage in a DUI collision is not a victim under the Victims' Bill of Rights.

The court of appeals granted review and relief, holding that Munjas fell within the statutory definition under the Act of a "victim," and that the crime of DUI had been committed "against" him. The court also held that a victim need not suffer personal injury to fall within the statutory definition of a crime victim.

State v. Williams, 200 Ariz Adv. Rep. 32 (1995)
Trial Judge Michael C. Nelson
Reversed

Police became suspicious of the defendant after questioning a woman who had been arrested for marijuana possession. As a result of her assurances that the defendant sold marijuana, police presented a justice of the peace with a warrant to search the defendant's trailer. The police discovered marijuana and drug paraphernalia, and arrested the defendant.

The defendant filed a motion to suppress the evidence found in his trailer, arguing that the police lacked probable cause for the search.

The trial court denied defendant's motion to suppress. The trial court found that the affidavit was legally insufficient because there were no facts supporting the informant's statement that the defendant was selling marijuana, indicating the informant's reliability, or tying the marijuana sales to the defendant's trailer. However, the trial court found that the officer's testimony showed that their reliance on the warrant was reasonable and in good faith, and admitted the evidence pursuant to the good faith exception to the exclusionary rule.

The matter was then submitted to the court on a stipulated record. The trial court found the defendant guilty, and ordered him to serve one year in jail.

On appeal, the defendant argues that the trial court should not have considered the evidence found in his trailer, and that the police lacked probable cause for the warrant. He also contends for the first time on appeal that the warrant used to search his trailer did not adequately describe the place to be searched.

The court of appeals reversed, holding that the informant was unreliable, and therefore there was no probable cause for the warrant. The court also held that

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the warrant was facially invalid because it did not adequately describe the place to be searched or the item to be seized, and that therefore, the police could not rely on it in good faith.

The court stated that the good faith exception to the exclusionary rule requires police conduct to be objectively reasonable. Here, the affiant, who belonged to the Apache County Cooperative Enforcement Narcotic Team, knew that the informant had withdrawn from her agreement to cooperate, and had lied about her criminal record. She had never bought marijuana from the defendant, never been in his trailer, and never seen him use marijuana. The officer gave inaccurate and contradictory information about the location of the defendant's residence.

The court held that there could be no good faith reliance here, and the "courts should not rubber-stamp such careless warrants or find good faith when trained officers execute a warrant as grossly deficient as this."

State v. Stevens, 200 Ariz. Adv. Rep. 45
Trial Judge Deborah Bernini, Pro Tempore
Affirmed

The state's evidence showed that the victim was stopped at an intersection in her car, when the defendant opened her door and told her that she had almost hit him. The victim testified that the defendant "looked very upset, and by his manner looked and the way he approached me, he looked like an abusive person," and that based on the way he looked, his "body movement and the way he talked" to her, she was afraid he might hurt her. The defendant then reached into her car and took her purse, containing $150 in cash, and ran.

The defendant was charged with robbery, burglary, and theft. The defendant moved for a judgment of acquittal on the robbery charge, which was denied. The state dismissed the theft charge at the conclusion of its case. The jury then found him guilty of the remaining charges.

The first issue on appeal was whether the court erred in denying defendant's motion for acquittal, which should be granted only if there is no substantial evidence to warrant conviction. The defendant argues that there was insufficient evidence of the threat to use or use of force, as required to prove this was a robbery, as opposed to mere theft.

The majority disagreed. Under A.R.S. §13-1901, threat means "a verbal or physical menace of imminent physical injury to a person." The court found that the victim was "clearly fearful," and that given the fact that carjackings are common, reasonable jurors could conclude that the threatening behavior was directed at coercing the victim into surrendering her purse.

In dissent, Judge Druke found that there was no evidence at all to establish that the defendant threatened or used physical force to take the victim's purse. While the victim was scared by defendant's actions, the element of fear was removed from the robbery statute in 1978. The new statute no longer views fear as an element of the offense, and the defendant's robbery conviction should be reversed to reflect a conviction of theft by control.

The second issue on appeal was whether the trial court erred in failing to instruct the jury after it submitted questions to the court during deliberations. The jury asked whether the defendant had to threaten, or "can the victim just perceive a threat?" They also asked the court to explain the portion of the robbery instruction relating to the threat to use and the use of force. The court told counsel it would tell the jury that the definition of threat had been given to them, and they should refer to it.

The appellate court held that because defense counsel failed to object to the court's refusal to give additional instructions, the issue was waived, and in any event there was no abuse of discretion here for failing to give additional instructions because the original ones were adequate.

Editor's Note: A special thanks to Karen Clark for preparing this month's summary of Arizona Advance Reports--Volume 200.

January Trials

October 17

Randall Reece: Client charged with first degree murder and child abuse (dangerous crimes against children). Investigator D. Beever. Trial before Judge Mangum ended January 19. Defendant found guilty of reckless child abuse (non-dangerous). Prosecutor Schroeder.

October 30

Russ Born/Reneé Scatena: Client charged with first degree murder. Investigator C. Yarbrough. Trial before Judge Hilliard ended January 8. Defendant found **not guilty**. Prosecutors Charnell/Daiza.

December 12

Jeremy Mussman: Client charged with criminal trespass (with two priors and while on parole). Investigator R. Barwick. Trial before Judge Seidel ended December 13. Charges **dismissed with prejudice**. Prosecutor Kennedy.

January 4

Donna Elm: Client charged with aggravated assault. Bench trial before Judge Bolton ended January 8. Defendant found **not guilty**. Prosecutor Macias.

Michael Gerity/Candace Kent: Client charged with possession of marijuana. Bench trial before Judge Sargeant ended January 4. Defendant found guilty. Prosecutor Hicks.

Jim Lachemann: Client charged with aggravated assault, aggravated DUI, and endangerment. Investigator H. Jackson. Trial before Judge Rogers ended January 10. Defendant found guilty. Prosecutor Ainley.

January 5

Vernon Lorenz: Client charged with DUI. Trial before Judge Hamblen (West Mesa Justice Court) ended January 5. Defendant found guilty. Prosecutor Miller.

January 6

Tom Kibler: Client charged with two counts of trafficking in stolen property, three counts of theft, three counts of offering to sell marijuana, and two counts of offering to sell dangerous drugs. Investigator R. Barwick. Trial before Judge Ryan ended January 23. Defendant found guilty. Prosecutor Thackeray.

January 8

Terry Bublik: Client charged with attempted murder and armed robbery. Investigator J. Castro. Trial before Judge Hilliard ended January 16 with a **judgment of acquittal.** Prosecutor Charnell.

Dan Carrion: Client charged with theft (with two priors). Trial before Judge McDougall ended January 9. Defendant found guilty with priors. Prosecutor Morden.

Jeremy Mussman: Client charged with aggravated assault, sexual abuse, attempted sexual assault, two counts of kidnapping, and three counts of sexual assault. Investigator A. Velasquez. Trial before Judge Seidel ended January 23 with a hung jury on sexual abuse, one count of kidnapping, and three counts of sexual assault. Defendant found guilty of attempted sexual assault and one count of kidnapping; **not guilty** of aggravated assault. Prosecutor Sullivan.

Karen Noble: Client charged with possession of marijuana for sale, possession of marijuana to transport, and possession of narcotic drugs. Investigator R. Corbett. Trial before Judge Lewis ended January 17. Possession of narcotic drugs charge dismissed; defendant found guilty on other charges. Prosecutor Armijo.

Tom Timmer: Client charged with aggravated DUI. Trial before Judge Brown ended January 11. Defendant found guilty. Prosecutor Mann.

Charlie Vogel: Client charged with conspiracy, possession of marijuana for sale, and smuggling/transportation of marijuana. Investigator D. Erb. Trial before Judge Ryan ended January 10. Defendant found guilty. Prosecutor Walsh.

January 11

Bob Billar: Client charged with aggravated robbery. Trial before Judge Dunevant ended January 12. Defendant found guilty. Prosecutor Myers.

Rob Corbitt: Client charged with theft. Trial before Judge Barker ended January 24. Defendant found guilty. Prosecutor Puchek.

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January 16

George Gaziano: Client charged with possession of marijuana. Trial before Judge Ishikawa ended January 18. Defendant found guilty. Prosecutor Flader.

John Taradash: Client charged with aggravated assault. Trial before Judge Jarrett ended January 22. Defendant found guilty. Prosecutor Iafrate.

January 17

Curtis Beckman: Client charged with DUI. Trial before Judge DeLeon ended January 17. Defendant found guilty. Prosecutor Barone-Jay.

Marci Hoff: Client charged with DWI. Bench trial before Judge McVay (Northeast Justice Court) ended January 18. Defendant found guilty. Prosecutor Woodburn.

January 18

Joel Brown: Client charged with second degree murder. Trial before Judge D'Angelo ended January 26. Defendant found guilty. Prosecutor Ruiz.

January 22

Vicki Lopez: Client charged with aggravated assault on a police officer and two counts of aggravated assault (dangerous). Investigator J. Castro. Trial before Judge Dunevant ended January 31 with a **judgment of acquittal** on aggravated assault on a police officer. Defendant found guilty of other charges. Prosecutor Kane.

January 24

Dan Carrion: Client charged with burglary F3 (with a prior) and burglary F4 (with a prior). Bench trial before Judge Bolton ended January 25. Defendant found guilty of burglary F3; burglary F4 dismissed. Prosecutor Rapp.

January 25

Melvin Kennedy: Client charged with telephone harassment. Bench trial before Judge Hamblen (West Mesa Justice Court) ended January 25. Defendant found guilty. Prosecutor Miller.

Kristin Larish: Client charged with second degree burglary. Investigator D. Erb. Trial before Judge McDougall ended January 26 with a hung jury. Prosecutor Iafrate.

Paul Ramos: Client charged with sexual abuse of a child under 15 and two counts of second degree burglary. Investigator G. Beatty. Trial before Judge Barker ended January 31 with a hung jury (seven guilty and five not guilty). Prosecutor Cook.

Leonard Whitfield: Client charged with two counts of aggravated DUI. Investigator L. Clesceri. Trial before Judge Ishikawa ended January 25. Defendant found **not guilty** of DUI; guilty of lesser-included driving on suspended license. Prosecutor Gundacker.

January 29

Bob Billar: Client charged with disorderly conduct (dangerous), criminal damage, and possession of dangerous drugs. Investigator R. Barwick. Trial before Judge Rogers ended January 31. Defendant found guilty of lesser-included charges on all counts except for criminal damage. Prosecutor Mroz.

Mark Potter/Ray Schumacher: Client charged with second degree burglary. Trial before Judge Ishikawa ended January 31. Defendant found guilty. Prosecutor Zettler. Ω

Bulletin Board

♦ ***New Support Staff:***

Marina Cuprisin started as a Records Clerk on February 05. Ms. Cuprisin has held various county positions before joining our Records Division.

♦ ***Speakers Bureau***

Slade Lawson and **Jim Leonard** spoke to 5th grade classes at Erie Elementary School in Chandler on January 17. They discussed the criminal justice system in class, and then took the students on a tour of the courts the next day.

Lawrence Matthew will speak to Chaparral High School students at Career Day on March 06, discussing indigent defense as a profession and the criminal justice system in general.

♦ ***Miscellaneous***

The annual index of ***for The Defense*** articles (from the newsletter's inception through December 1995) is now available. Anyone who would like a copy may obtain one from Sherry Pape in our Training Division. Ω

Computer Corner

This column is designed to provide simple computer tips helpful to people in the legal field. These tips are fashioned for WordPerfect 5.1 in DOS. If you have any problems, questions or suggestions that you would like to share, please contact Ellen Hudak in Trial Group B (506-8331).

A "Disk Jacket" Macro

A lot of us save documents to disk that we want to preserve for future use. Have you ever picked up a disk and cannot remember what files are on it? I came across a macro that will make a jacket holder to protect the disk, and will also display on the outside of the jacket all files on the root directory. (It will not list files in a directory or subdirectory on the disk).

Creating Macro:

This macro requires a WordPerfect 5.1 release date of 6/29/90 or later. To check the release date in your computer, press *Help* (F3) and look at the revision date printed in the upper, right-hand corner of your screen. Press *(Enter)* to return to your document.

Before you start the macro, I have listed several tips on how to retrieve some of the Macro Commands to make the task easier.

Bolded items enclosed in French braces{}, such as **{Format}** and **{Exit}**, are macro commands and should not be typed from the keyboard. Only those portions of a macro which are **not bolded** and do **not appear** in French braces should be typed from the keyboard.

Commands in braces {} containing all capital letters are macro programming commands. To enter these commands, you must enter the Macro Commands menu found when you are in your "advanced" Macro Define mode. To do this, press (Ctrl-Page Up) after you have pressed (Home) (Macro Define) or (Home) (Ctrl-F10). Highlight desired command, and press (Enter) to inset the command into the macro and return to the Macros Editor Screen.

Some commands such as: **{Exit}**, **{Enter}**, **{End}** must be prefaced with (Ctrl-V).

Control commands, those in braces with a caret in front of them such as **{^]}**, or **{^\}** are created by holding down the (Ctrl) key, then pressing the character. To obtain **{^V}**, press (Ctrl-V) twice.

Some other commands you will need to know for this macro are:

{Del to EOL} - (Ctrl-End) **{HPg}** - (Ctrl-Enter)

In the macro you will see ·, this signifies a space between words and you will hit your space bar as you would normally do between words. You will also see o in place of the period that you type. This is just how it looks in the macro commands.

To create the macro: at a blank document screen press *(Home)*, Macro Define *(Ctrl-F10)*, type *Jacket* (or whatever name you desire to use), and press *(Enter)*. Type a description, such as *Creates disk jacket with file list*, and press *(Enter)*. Press *(Right Arrow)* and *(Enter)* to move past the **{DISPLAY OFF}** code, then insert the commands as follows: **(Do not type the numbers at the beginning of each line. I have inserted them for your convenience in following where you are at when creating the macro).**

(cont. on pg. 35) ☞

```
1       {DISPLAY OFF}
2       {Format}172.4"{Enter}2.4"{Enter}{Enter}
3       250.3"{Enter}{Enter}{Enter}
4       4810.2"{Enter}50{Enter}{Exit}·
5       {Graphics}1430.1"{Enter}0.1"{Enter}0.1"{Enter}0.1"{Enter}{Exit}
6       {CHAR}Drive ~ Create·disk·jacket·for·disk·in:··
7       {^\}·Drive·{^]}A{^\};··Drive·{^]}B{^\}:· ~
8       {List}{VARIABLE}Drive ~ :\*.*{Enter}
9       {Home}{Home}{Down}{ASSIGN}Last ~ {SYSTEM}Entry ~ ~
10      {ON NOT FOUND} ~ n!{Enter}
11  {ASSIGN}Entry ~ {SYSTEM}Entry ~ ~
12  {ASSIGN}Count ~ 1 ~
13  {Exit}{VARIABLE}Entry ~ {Enter}
14      {LABEL}Loop ~
15  {List}{VARIABLE}Drive ~ :\*.*{Enter}
16  n{VARIABLE}Entry ~ {Enter}{Right}
17  {ASSIGN}Entry ~ {SYSTEM}Entry ~ ~
18  {ASSIGN}Count ~ {VARIABLE}Count ~ +1 ~
19  {PROMPT}·{VARIABLE}Count ~ .·{VARIABLE}Entry ~ ~
20  {IF}"{VARIABLE}Entry ~ "!="{VARIABLE}Last ~ " ~
21      {Exit}{VARIABLE}Entry ~ {Enter}{GO}Loop ~
22  {END IF}
23  {Exit}{VARIABLE}Entry ~ {PROMPT}{Del to EOL} ~
24  {Home}{Home}{Up}{Block}{Home}{Home}{Down}{Move}11
25  {Graphics}1142{Enter}6149{Center}{Bold}
26  {TEXT}Label ~ Enter·a·label·for·this·disk:· ~
27      {VARIABLE}Label ~ {Bold}{^V}{Enter}{^V}{Enter}{Enter}
28  {Columns/Tables}1330.15"{Enter}{Exit}1{Up}
29      {ASSIGN}Rows ~ {VARIABLE}Count ~ /2 ~
30      {IF}{VARIABLE}Count ~ %2=1 ~
31      {ASSIGN}Rows ~ {VARIABLE}Rows ~ +1 ~
32      {END IF}
33  {FOR}X ~ 1 ~ {VARIABLE}Rows ~ ~ 1 ~
34  {Down}
35  {END FOR}
36  {End}{Del}{HPg}{Exit}{Exit}
37  {CHAR}Size ~ Disk·size:··1{^\}·3.5-inch;··
38  {^]}2{^\}·5.25-inch···{^]}1{Left} ~
39  {Format}170.3"{Enter}0.3"{Enter}{Exit}
40  {IF}{VARIABLE}Size ~ =2 ~
41  {Graphics}52141.5"{Enter}2235"{Enter}{Exit}
42  {Graphics}52147"{Enter}2235"{Enter}{Exit}
43  {ELSE}
44  {Graphics}51227.45"{Enter}{Exit}
45  {Format}4137.55"{Enter}{Exit}
46  {Center}{^V}6,64{Enter}{^V}6,62{Enter}{Left}{Font}14
47  ·Cut·here·for·a·3.5-inch·disk
48  {END IF}
```

(cont. on pg. 36) ☞

USING THE MACRO

To use the macro, place the floppy disk that you want to create a jacket for in A (or it applies to you, B) drive. Then, at a blank document screen, press Macro **(Alt-F10)**, type *jacket* (or whatever you named it) and press **(Enter)**. At the **Create disk jacket for disk in: drive A;Drive B;** prompt, press A (if your disk is in the A drive).

The macro displays the file names being added to the disk jacket in the lower left corner of the screen. When it has finished, you will be prompted to **Enter a label for this disk**. Type a brief label (30 characters or less) and press **(Enter)**. At the **Disk size: 1 3.5-inch; 2 5.25-inch** prompt, select your disk size. When the macro finishes, you will not see the file list, since it is created in a graphics box. If you want to view the file list before you print it, press Print **(Shift-F7), (6)** View Document. Press Exit **(F7)** when finished.

3.5-INCH FLOPPY DISKS

If you are creating a label for a 3.5-inch disk, first cut off the bottom portion of the paper along the indicated line. Then take the bottom edge of the paper, fold it up to meet the top edge, and crease the paper in the middle. The file list should be on the outside and front when you are finished.

Next, fold along the two outside vertical borders of the file list so the two sides are folded to the back with the label facing to the front. The two back folds will overlap about three-fourths of an inch. *Tip*: As you do this step, you may want to fold the paper around a 3.5-inch disk to make sure you leave enough room inside the jacket for the disk. Finally, use some transparent tape to tape down the edges on the back, bottom and top of the disk envelope, leaving the main opening at the top of your disk. Ω

Brainteaser for February.
(Answer in March's
issue of *'for The Defense'*)

JUST FOR FUN

111111
or
another another
another another
another another

Answer to December's "Brainteaser" -- ***Reading between the lines.***